Supreme Court, U.S.
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Docket No.: _____

IN THE UNITED STATES SUPREME COURT
Filed in 1997 October Term

SHIRLEY C. CAIN,
Individually and as Personal
Representative of the Estates of
BRIAN KEITH THOMPSON,
GREGORY ALLAN HERLITZKA,
LYNETTE LORRAINE HERLITZKA
and CYNTHIA S. HERLITZKA,
Deceased,
Petitioner,

v.

THE CITY OF TACOMA,
A Municipal Corporation, and its
TACOMA HOUSING AUTHORITY,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Washington [Docket No. 63726-1]

PETITION FOR WRIT OF CERTIORARI

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124 pp

PETITION FOR WRIT OF CERTIORARI
Shirley C. Cain v. The City of Tacoma, *et al.*

(a) Questions presented for review.

1. Can a State statute of repose be applied to bar federal claims under 42 USC § 1983 and federal claims as third party beneficiaries of HUD regulations and contracts?

2. Can a city avoid the responsibility to provide safe housing under HUD funding regulations and contracts by creating a housing authority?

(b) A list of all parties to the proceedings in the court whose judgment is sought to be reviewed and a list of parent companies and non wholly owned subsidiaries as required by Rule 29.6.

Shirley C. Cain, individually and as personal representative of the Estates of Brian Keith Thompson, Gregory Allan Herlitzka, Lynette Lorraine Herlitzka, and Cynthia S. Herlitzka, deceased;

The City of Tacoma, a municipal corporation;

The Tacoma Housing Authority, a municipal corporation;

PETITION FOR WRIT OF CERTIORARI
Shirley C. Cain v. The City of Tacoma, *et al.*

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(h) A direct and concise argument amplifying the reasons for allowance of the writ -- See Rule 10. 8

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(e) A concise statement of the basis for jurisdiction in this Court, showing:

(i) The date of judgment(s) or order(s) sought to be reviewed: 6 May 1998; 31 Jan.1994; 10 Oct.1997

(ii) The date of order respecting rehearing: None.

(iii) The statutory provision conferring jurisdiction on this Court to review on a writ of certiorari the judgment in question: 28 USC § 1257.

(iv) Statement that notification required by Rule 29.4(b) or (c) has been made:

Neither the State of Washington nor any agency, officer or employee thereof is a party to this action, so that 28 USC § 2403(b) may apply. Therefore, this initial document filed in this Court has been served on the Attorney General of the State of Washington:

Christine Gregoire, Attorney General, State of WA
670 Woodland Square Loop SE / P O Box 40124
Olympia WA 98504-0124

(f) The constitutional provisions, statutes, regulations involved in the case, set out verbatim with appropriate citations:

Amendment XIV to the Constitution of the United States of America:

Section 1: No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . A-31

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(Lists relevant portions of **1973 Uniform Building Code** applicable, including § 3301(b), § 3302(a), § 1310(a); Chapter 13, Group "H" Occupancies § 1302(b), § 1304, § 301(a), § 408, § 409, § 420; Chapter 13, Existing Buildings § 1313(a))

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(g) A concise statement of the case setting out the facts material to consideration of the questions presented. . .

Shirley Cain brought this action for the fire deaths of her daughter, Cynthia Herlitzka, and her three grandchildren, Brian Keith Thompson, age 2; Gregory Herlitzka, age 3; and Lynette Herlitzka, age 10 months, when they were trapped in a third-floor bedroom of an apartment complex owned by the City of Tacoma through its Housing Authority and subsidized by HUD, at 2360 South G Street in Tacoma, Washington, on 26 January 1988.

A witness saw the four victims in the top bedroom window during the fire, but they were trapped because the fire started in the living room, three levels below the bedroom, and blocked the stairs to the single exit. This specific hazard was noted by the fire department in January, 1980, in conjunction with the acquisition of the apartment by the City through its Housing Authority, and it required a second smoke alarm to be installed in the living room as a condition of occupancy, but one was not installed.

In 1940, the City of Tacoma created its Housing Authority by Resolution 11050 (A-55) and appointed its first commissioners (A-57). The housing project involved was known as the Conifer Apartments or Hillside Terrace Apartments. The property was originally developed by a private investor, Victor Lyon, in 1970 and financed through the National Housing Act with the mortgage assigned to the Secretary of Housing & Urban Development on 26 December 1992. On 10 October 1973, Conifer Company II surrendered its equity by deed to the Secretary of Housing & Urban Development. The subsequent remodeling project was designated Wash. 5-18.

(It is important to note that HUD is authorized to and only deals with the elected local government entity, even though said entity may create agencies or corporations to carry out its functions:

> "24 CFR 570.700 states that designation of a public agency (e.g., the municipal authority) to

> administer Section 108 activities does not relieve the City of its responsibilities to assure the administration of the program in accordance with all HUD requirements." (Report to the Regional Administrator, 7/13/1990, at A-61).)

In 1970, by Resolution 20733 (A-54), the City of Tacoma began the process of acquiring the Conifer Project, to include entering into a Cooperation Agreement with its local Housing Authority (A-61). On 1 November 1976, HUD deeded the Conifer/Hillside Terrace property to Tacoma's Housing Authority. The purchase price was $289,000, which funds were loaned by HUD (A-72,73). HUD further loaned $5,645,551 to remodel the project Wash. 5-18 (A-77,78). (It is also important to note that when the cost of alterations or repairs exceeds 50% of the value of the existing building, the building will be required to conform to the requirements for new buildings, and the exceptions found in the fire code for existing buildings do not apply, 1973 Uniform Building Code § 103(b) adopted by the Washington State Legislature in 1974, A-42)). The Notice of Date of Full Availability was issued on 29 February 1980.

At the time of original construction in 1969, the second exit to the top-floor bedroom was supplied by a balcony which allowed access to an adjoining unit separated by a fire wall (A-78). The balcony was enclosed in the 1977 remodeling, and when the building and fire inspectors raised the issue, the City applied Ordinance 19587 (A-45), predecessor to 23218 (A-45), to allow a window to serve as a second exit. These two codes are successive versions of the Fire Code for Existing Buildings. The building code in effect at the time did not allow a window to satisfy the second exit requirement. During the remodeling, the fire marshall required a second smoke detector in the five-level units, such as the one in which these victims were burned to death (A-80). The second smoke detector was never put into this unit.

These deviations from the building code, fire marshall's requirements, and HUD minimum standards were known to the City, and yet it approved the remodeling, issued permits, inspected, and issued the certificate of occupancy.

HUD regulations set forth Minimum Property Standards for multi-family housing, which include the provisions of the Uniform Building Code. The June, 1969 Standards and the 1967 Uniform Building Code, applicable to the apartment at the time of the original construction, provide:

> ". . . Floors above the second story, basements and cellars used for other than service of the building shall have not less than two exits."

This requirement continued in all subsequent versions of the HUD standards and the Uniform Building Code (A-44).

After 1982, HUD regulations were amended to accept local building codes if approved by the HUD Field Office (24 CFR 11 § 200.95c, § 200.925ab, implementing 42 USC § 1437L(j)(2)):

> § 200.925b ". . . HUD will review each local code submitted under this chapter to determine whether it regulates all of the following areas and sub areas:
> (a) fire safety,
> (5) means of egress (number and distance);
> (6) individual unit smoke detectors;" (A-32,33)

The City of Tacoma submitted to HUD on 12 December, 1985, what purported to be its Uniform Building Code, Uniform Mechanical Code, Uniform Fire Code and Uniform Plumbing Code (A-82). Please note that the City of Tacoma submitted Ordinance 23219 as its fire code, but not Ordinance 23218 or its predecessor 19587, which were utilized by the City to allow a window to satisfy the second exit from the top floor of the fatal unit.

Petitioner filed an administrative claim with the City of Tacoma on 13 July 1989 and subsequently initiated this action. The Housing Authority was dismissed as a party by stipulation based upon a settlement which specifically preserved all claims based upon its actions as an agent of the City (A-4,5). The Complaint first raised the issues upon which this review is sought:

> "12. The City of Tacoma through the Tacoma Housing Authority acquired numerous

apartments of common design and construction along Court 'G' and contiguous streets between South 13th and 25th Streets and entered into an agreement with the Department of Housing and Urban Development to provide them to low income individuals and to maintain the premises in a safe condition. The plaintiff and her decedents were and are third-party beneficiaries of these agreements.

13. Many of the units, such as plaintiff's, had third floor bedrooms which were equipped with only one exit and were not provided with properly placed smoke detectors. The defendants, through their agents and employees, were on notice of the failure of the premises to comply with the HUD administrators' Minimum Standards, industry standards, the Uniform Building Code and the Uniform Fire Code and by official policy and custom failed to cure the defect in the premises.

14. The defendants, their employees and agents wilfully, wantonly and recklessly failed to properly locate smoke detectors for the upper bedrooms, provide them with second exits and remove obstacles to fire rescue equipment, all in reckless disregard for the lives and property of occupants." (Third Amended Complaint, page 4 line 12 *et sequitur*.)

The City moved for summary judgment, which the trial court denied (A-1). The City appealed and the Court of Appeals reversed the trial court on these issues and remanded it for trial (A-11, 17-18):

Court of Appeals Division II opinion, 31 January 1994, page 9 line 5:

"Accordingly, we conclude that Cain's non-constitutional claims against Tacoma arising from the 1979 inspections are time-barred. The trial

court, therefore, erred in not granting summary judgment for the City on those claims."

RCW 4.16.310. Actions or claims arising from construction, alteration, repair, design, planning, survey, engineering, etc., of improvements upon real property -- Accrual and limitations of actions or claims

All claims or causes of action as set forth in RCW 4.16.300 shall accrue, and the applicable statute of limitations shall begin to run only during the period within six years after substantial completion of construction, or during the period within six years after the termination of the services enumerated in RCW 4.16.300, whichever is later. The phrase "substantial completion of construction" shall mean the state of completion reached when an improvement upon real property may be used or occupied for its intended use. Any cause of action which has not accrued within six years after such substantial completion of construction, or within six years after such termination of services, whichever is later, shall be barred: *Provided*, That this limitation shall not be asserted as a defense by any owner, tenant, or other person in possession and control of the improvement at the time such cause of action accrues. The limitations prescribed in this section apply to all claims or causes of action as set forth in RCW 4.16.300 brought in the name or for the benefit of the state which are made or commenced after June 11, 1986.

RCW 4.16.300. Actions or claims arising from construction, alteration, repair, design, planning, survey, engineering, etc., of improvements upon real property

RCW 4.16.300 through 4.16.320 shall apply to all claims or causes of action of any kind against any person, arising from such persons having constructed, altered or repaired any improvement upon real property, or having performed or furnished any design, planning, surveying, architectural or construction or engineering services, or supervision or observation of construction, or administration of construction contracts for any

construction, alteration or repair of any improvement upon real property. This section is intended to benefit only those persons referenced herein and shall not apply to claims or causes of action against manufacturers.

Page 9 line 12:
"Cain responds that the City's failure to adequately enforce applicable codes and regulations amounted to a constitutional deprivation because it deprived the decedents of their right to life. We disagree. At most, the record before us suggests that the City may have negligently failed to enforce certain code provisions and HUD regulations. Mere negligence by a government actor does not automatically give rise to a private cause of action under 42 USC § 1983."

Page 10 line 3:
"Cain argues, additionally, that under 42 USC § 1983, she has a private cause of action against the city for its failure to enforce applicable HUD regulations even without a showing of constitutional deprivation. Even assuming that Cain's assertion is correct, we are satisfied that no cause of action lies for the City's alleged failure to enforce applicable HUD regulations absent a showing that the City was obligated to enforce these provisions.

Cain contends that a "cooperation agreement" executed in the early 1970's between the City and the Housing Authority obligated the City to enforce applicable HUD regulations and subjected it to liability for failing to do so. In our view, the agreement Cain refers to does not contain any language that obligates the City to enforce HUD regulations."

Page 13 line 3:

"Accordingly, while 42 USC § 1983 may provide people living in public housing with a private right of action against state and local officials for violations of federal housing laws and regulations, see e.g. Wright v. Roanoke Redevelopment and Hous. Auth., 479 U.S. 418, 423, 93 L.Ed.2d 781, 107 S.Ct. 766 (1987), we are satisfied that no such action lies absent a showing that the officials are under a duty to enforce the federal provision. Cain has made no such showing. Consequently, the trial court erred in not granting summary judgment to the City dismissing Cain's 42 USC § 1983 claim."

The trial court granted the City's Renewed Motion for Summary Judgment (A-19) and petitioner appealed. The Court of Appeals sustained the trial judge (A-22):

Opinion of Div. II, No. 21119-0-II, 10 Oct. 1997:

Page 3 line 5:

"By unpublished decision, noted at 72 Wn.App.1042 (1994)(Cain I), this court held that the statute of repose barred Cain's nonconstitutional claims arising from the 1979 building inspection, (2) that Cain did not show a constitutional deprivation necessary for her 42 USC § 1983 claim, and (e) that the public duty doctrine did not bar Cain's negligence claim because the legislative intent exception applied."

Page 3 line 18:

"But, where the same case is again before the appellate court following a remand, "[t]he appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same cause and, where

justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review."

Petitioner sought discretionary review of these issues by the Washington Supreme Court, which was denied on 6 May 1998 (A-30) and this Petition for Writ of Certiorari was timely filed therefrom.

(h) A direct and concise argument amplifying the reasons for allowance of the writ -- See Rule 10.

Rule 10(b) A state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals.

Rule 10(c) A state court or a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this court.

Scope of Review

These issues come to this Court from summary judgment determinations by lower courts, so this Court may review the issues and facts *de novo* (Erickson v. Pierce County, C.A.9 (Wash.) 1992, 960 F.2d 801, as amended, *certiorari denied* 113 S.Ct. 815, 506 U.S. 1031, 121 L.Ed.2d 687).

1. Can a state statute of repose be applied to bar federal claims either under 42 USC § 1983 or as third party beneficiaries of HUD regulations and contracts?

Assuming arguendo that the City is not the real owner or controller of the HUD apartments through its agent Housing

Authority, so that it does not fall within the exceptions to the Washington State Statute of Repose, RCW 4.16.310 (A-37), the City would be liable for approving the remodeling, issuing permits, inspecting and issuing the Certificate of Occupancy in 1980, knowing that the second exit was eliminated and that the second smoke detector was not installed in the living room. (Halverson v. Dahl, 89 Wash.2d 673, 678, 574 P.2d 262, 269, 737 P.2d 1257 (1987); Waite v. Whatcom County, 54 Wash.App. 682, 775 P.2d 967 (1989)).

There is evidence that the building department specifically raised the question of the loss of the second exit by enclosing the balcony in 1977 and Wes Stuart of the fire department utilized the existing building ordinance 19587 (predecessor to 23218) to approve the design, while all involved, including the lead architect, knew it was wrong. Similarly, the requirement for a second smoke detector on the level where the subject fire began was also known (A-80). Finally, the intentional failure to provide Ordinance 23218 to HUD cannot be condoned.

> "Q. How many exits were there from the top bedroom in that apartment?
> A. The door, and the bedroom window is considered a second exit in that particular type of building. So, two in that regard.
> Q. When you say the door, what door?
> A. The door to the common stairway.
> Q. The common stairway within the apartment?
> A. Right.
> Q. That stairway goes down to the door that you opened?
> A. It goes down to the kitchen, and then the kitchen to the living room
> Q. And then the door you opened?
> A. Right.
> Q. The only exit other than out the window is the door that you attempted to open for that apartment?

A. Right.
Q. Now, with the window, and this is the one that the Oriental couple had pointed towards, the top window --
A. Okay.
Q. -- was that window, could it open?
A. It's openable, yes.
Q. It was? You recalled that when you were there?
A. Right. That's one of the things I do. . . .
Q. So, in your interpretation of the ordinance 23218, this apartment was three stories or more in height?
A. Right.
Q. How many stories above the street was the window that these Oriental people had been pointing to, the top window in this apartment?
A. Three stories.
Q. Do you know how many feet that was?
A. No, I couldn't tell you.
Q. So, is it your opinion that because there was a window that would open, that was an exit that would qualify under Ordinance 23218 for your purposes?
A. Yes.
Q. Was there a requirement under Ordinance 23218 for two exits from the sleeping areas in that apartment?
A. Yes.
Q. Was there a fire escape for that window of that apartment?
A. No.
Q. Was there a rope ladder?
A. No.
Q. Was there any ladder on the outside of the building that people could get down?
A. No.
Q. Have you, subsequent to the fire, entered one

of the apartments and looked out a window of similar height?
A. Sure.
Q. Have you ever jumped from that height?
A. No. And I hope I never have to."
(Quoting from Inspector Bernard Blackburn's deposition, page 65 line 24 *et seq.*).

"Q. Was there one or more smoke alarms in these premises?
A. Individual apartments, or --
Q. In this apartment?
A. In this apartment. One smoke alarm, if I recall, up on the third floor.
Q. Do you recall where it was located?
A. Top of the stairway."
(Deposition of Bernard Blackburn, page 42 line 1 *et seq.*).

See Plan Correction Sheet 26 June 1969 (A-78):
"16. Balconies on third floor of units shall provide access to other apartment as secondary exit.
17. All exitways from 3 story buildings to be of 1-hr fire resistive construction."

See City of Tacoma Public Works Department Memo 1/28/77 (A-79):
"Floors above 2nd Floor shall have not less than 2 exits. Call Wes Stewart (exiting ord. #19587"

See letter from Stanley N. Parrish, fire marshall, 14 November 1977 (A-80):
" . . . the Tacoma Fire Prevention Bureau feels the height is excessive; therefore, we are requesting that a second smoke detector be installed at the lower level living rooms."

The following are excerpts from the deposition of 1976 Project

Architect William Reed:

Page 17 line 12:

"Q. And was your task to design the changes to the existing buildings to comply as best you could with the needs of the community and the Housing Authority and the restrictions from HUD as expressed either in regulations or their handbook Secretary's Handbook?

A. Yes."

Page 45 line 11:

"Q. Now, on the same page of Exhibit 3, which is the plaintiff's first requests for admission to the Tacoma Housing Authority and City of Tacoma, the Request No. 1 refers to Uniform Building Code 330(a) number of exits, '. . . Floors above the second, basement and cellars used for other than service of the building, shall have not less than two exits.' Were you aware of this requirement from the Uniform Building Code?

A. Am I aware of it?

Q. Right.

A. Yes.

Q. Now, when you were doing the plans for the remodeling of these dwellings for the Housing Authority, such as Building 18 in 1976 and 1977, did you determine whether the upper bedroom of the C unit satisfied this requirement?

A. I personally didn't.

Q. From your experience, would merely an opening window satisfy the requirement for a second exit? . . .

A. I would not consider what we have on the third floor a second exit. I would not consider that window as approved or a genuine first class second exit.

Q. So is it fair to say that assuming that your work and your firm's work that was done for

remodeling in 1976 of these premises, and satisfying the 1973 Uniform Building Code as amended and adopted by the City of Tacoma, that either the City of Tacoma did not enact the provision of the Uniform Building Code that required a second exit for floors above the second story, or there was a waiver that had been issued by the City for the remodeling project? . . .
A. I've talked with the City. I've talked with Cap Pearson, who is the City building official now, about it, and I don't think that -- Somehow the plans got approved, and approved the way they were drawn. And I don't know whether the City waived the code, or whether they didn't pick up on it. I just don't know. I just don't know the details of what happened."

The following are true excerpts from the deposition of William Larkin IV taken 21 March 1990:

Page 73 line 20:

"Q. Which provision of the Code are you referring to that would have been in effect in '77 to '79 time frame?
A. Section 106 of the 1973 Edition of the Uniform Building Code."

Page 74 line 21:

"Q. Was that provision applicable, in your opinion, to a requirement for a second exit above the second story?
A. Yes. If I remember correctly, it is a '73 code, that is applicable to the remodel, so that provision would be applicable."

Page 75 line 21:

"A. As you indicated you know, it does refer to design, and second exit is a design element.
Q. Okay. Who in 1977 to '79 time frame of the remodeling of these premises would have held the authority to exercise the discretion that's provided

in that section?
A. It had to be Thompson."

The following are true excerpts from the deposition of Ben Thompson taken 26 April 1990:
Page 35 line 12:

"Q. Which provision of the Fire Code and Building Code that was in effect at the time indicates that there was no need for a second exit above the second story of the sleeping areas?
A. At the time the buildings were constructed now or --
Q. When they went through the remodeling phase and you signed the Certificate of Occupancy in 1979?
A. At that time I believe probably the most persuading evidence would be the Fire Code in effect at that time. It was Ordinance No. 19587.
Q. Is that the Fire Code, or the Fire Prevention Code?
A. Fire Prevention Code."

The following are true excerpts from the deposition of Charles Pearson taken 26 May 1990:
Page 34 line 2:

"Q. Okay. Do you recall any discussions with either the Fire Department or the Architects or anyone on the Planning Staff regarding the provision for a second exit for the sleeping areas above the second floor in these apartments?
A. I don't recall it.
Q. Was there any change to the provision of the Tacoma Building Code between the time you originally approved the -- or did the plan check on the original construction and the time of the remodeling of these premises as to the requirement for a second exit for sleeping areas above the second story?

A. No.

Q. From your experience in your position from 1977 through '79, would merely a window that opened without a fire escape or ladder satisfy the requirement for a second exit for a sleeping area above the second story?

A. A window normally would not satisfy the second exit requirement referred to in Section 3302(a) of the '67 code.

Q. Now was that same section also contained, or similar wording, in the 1973 code?

A. Yes.

Q. And that section was also adopted by the City of Tacoma?

A. Yes.

Q. Now, you have indicated back in 1969, when the original project was built, that the determination as to having the balcony and the access to the adjoining apartments around the fire wall satisfying the second exit was made by the chief of the section, which at that time would have been Ben Thompson or Ron Button. Who would have been in a position to make the type of decision as to what would satisfy the requirement for the second exit in the remodeling of '77 to '79?

A. Ben Thompson."

Page 36 line 20:

"Q. Handing you a letter of 18 December 1985 from Mr. Larkin to the Department of Housing & Urban Development, was this the letter you had referred to before having a response to the Department of Housing & Urban Development?

A. It appears so, yes.

Q. Now, in that letter -- you write that letter for Mr. Larkin?

A. Yes.

Q. Okay. Now, in that letter, you have indicated

that you enclose two different codes, is that right; the fire code and the building code. I guess there is a plumbing code and some other things?
A. There is a bunch of stuff here. Which one were you referring to again?
Q. You refer to having enclosed the fire code and building code.
A. Okay.
Q. Okay. And attached to that letter is Ordinance 23219?
A. Right.
Q. That is referred to in the letter as fire code; is that right?
A. Yes.
Q. There is Ordinance 23218, which was enacted on the same date?
A. Yes.
Q. Why didn't you send 23218?
A. I have no idea.
Q. Okay. The ordinance 23219 does not contain a reference to a window satisfying any requirement for a second exit, does it?
A. I kind of doubt it, but basically that was the ordinance which adopted the fire code by reference.
Q. Right. But Ordinance 23218 is a fire prevention code that is applicable to existing structures?
A. Yes.
Q. And it's the one that contains the provision as to Group R occupancies where a window that is approved by the Fire Marshall for emergency exit, can satisfy the second exit requirement?
A. Yes.
Q. But this ordinance was not sent to the Department of Housing & Urban Development in response to its request in 1985; right? At least not by you?

A. Apparently, if it doesn't say it was on there, I apparently didn't send it."

The following are true excerpts from the deposition of Stanley Thaut, City of Tacoma Fire Chief, Vol. 2, taken 24 April 1990:

Page 30 line 24:

"Q. Okay. And you say other inspections. Were there any memoranda or notes reflecting any waivers of the Uniform Fire Code or the Uniform Building Code?

A. No, none that I found."

Page 31 line 15:

"Q. Now when a fire inspector goes to a multi-family dwelling such as these HUD apartments down on G Street and does his annual inspection, or what you attempt to make annual inspections, is his inspection limited to the compliance of the structure with Ordinance 23218?

A. No."

Page 24 line 13:

"Q. Okay. Let's go to the next hypothetical. If, in the 1977 through 1979 time frame when these buildings were remodeled, if the extent of the remodeling was substantial enough to trigger under the Uniform Building Code a requirement to satisfy the current code, as opposed to the code when the building was originally built, over 50% remodeling there's a trigger there, let's assume it was triggered. The 1973 Uniform Building Code that was adopted by the City of Tacoma applicable in 1977 through 1979 time frame, required a second exit for sleeping areas above the second floor, and a window would not satisfy that requirement; but Ordinance 23218, which is the successor to 19587, would that provision allow a window to be second emergency exit, would that supersede the Uniform Building Code?

A. Not in my opinion."

Page 28 line 6:

Q. Okay. Would you have expected them to realize that if the Uniform Fire Code required a second exit other than a window for sleeping areas above the second floor as to a specific structure, the provisions of 23218 would not take precedence over it, wouldn't remove that requirement?

A. I would think so.

Q. And would you have understood them to realize that 23218 would not waive a requirement of the Uniform Building Code?

A. I would expect that, yes."

Page 33 line 7:

"Q. Okay. Assume that the Uniform Fire Code and the Uniform Building Code for this structure on South G Street, that is Building 18, required a second exit from the sleeping area above the second story, or second floor, and that they were enclosed in 1979, the second exit was enclosed. Would it be within the task of the fire inspector that did the annual inspection to determine whether or not that enclosure was in accordance with the provisions of the Uniform Fire Code and the Uniform Building Code applicable at the time of the original construction and remodeling of the premises?

A. It would be his responsibility to see if it complied with the Uniform Fire Code. It's what he's responsible for enforcing this, is the provisions of the Uniform Fire Code.

Q. So he's responsible for both 23218 and 23219?

A. That's correct."

Page 34 line 20:

"Q. Okay. While you've been Fire Chief, has there been a requirement in the City of Tacoma for multi-family structures to provide access for ladder companies to the upper floors, floors above

the second story? In other words, for removal of vegetation, removal of obstructive trees, that type of thing?

A. No. Not to my recollection, although we require, you know, access for us to be able to get in there with ground ladders. There is, there is so many areas where we have apartment houses where they have landscaping and grass and that sort of thing, that we can't get aerial equipment in there, because it's too heavy for the ground. And you just sink in the ground. But we do have to be able to have access to get near the ground ladders with our crews."

From the foregoing it is clear that Ben Thompson waived the requirement for a second exit which qualified under the Uniform Building Code and approved the enclosure of the balconies on the subject premises in the 1977-'79 time frame. This waiver was contrary to the Cooperation Agreement with the Housing Authority and with the regulations of the Department of Housing & Urban Development. He also signed the Certificate of Occupancy (A-81).

The National Fire Protection Association produces the NFPA 101 Handbook. This is the standard of the industry and provides guidance as to what is a viable means of Emergency Exit, means of escape, in § 22-2.1.2:

"Second means of escape:

(c) an outside window or door operable from the inside without the use of tools . . . if (1) the window is within 20 feet of grade or (2) the window is directly accessible to fire rescue apparatus as provided by the authority having jurisdiction, or (3) the window or door opens onto an exterior balcony."

In the instance of Building 18 of the Confer Apartments, the distance between the window sill from the top bedroom and the first landing zone was 23.9 feet. The initial landing zone was

not really viable because, in the path of a drop from the window, there was an overhang and the landing zone contained a wrought iron railing which was only 7.7 feet from the wall; then there was another 2.3-foot drop to a slanted planting area; then down a rockery another 5.3 feet to the street level, for a total drop of 32.4 feet.

Petitioner's federal claims arise under 42 USC § 1983 and as a third party beneficiary of the HUD regulations as applied through the Cooperation Agreement and Consolidated Annual Contributions Contract to provide safe housing:

Consolidated Annual Contributions Contract, September 15, 1976, § 5, Justification:

> " . . . The development and operation of each project in accordance with this contract will provide decent, safe, and sanitary dwellings within the financial reach of families who are in the lowest income group and who cannot afford to pay enough to cause private enterprise in their locality or metropolitan area to build an adequate supply of decent, safe, and sanitary dwellings for their use (which families are herein called 'families of low income'), and the provisions of this contract are adequate to ensure that each such project will be developed and operated in compliance with all the requirements of the Act . . . ."

Claim under 42 USC § 1983:

> "Since 1874, § 1983 has expressly provided a private cause of action for claims arising from 'deprivation of any rights, privileges or immunities secured by the Constitution and laws' by individuals acting under color of state law. Until Maine v. Thiboutot, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980), the 'and laws' phrase was generally ignored. In Thiboutot, the court formally recognized that § 1983 provided a private cause of action for 'claims based on purely statutory violations of federal law' by state actors.

Now plaintiffs suing state actors who cannot satisfy Cort v. Ash (422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed. 26 (1975)) by showing that the same congress which created a statutory right also intended to give them a civil remedy may rely upon the general purpose of § 1983 -- 'provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights'. Monell v. New York City Department of Social Services, 436 U.S. 658, 700-701, 98 S.Ct. 2018, 2041, 56 L.Ed.2d 611 (1978).

Two requirements persist. A separate federal statute must create enforceable rights, privileges or immunities, Pennhurst State School & Hospital v. Halderman, 45 U.S. 1, 19, 101 S.Ct. 1531, 1540, 67 L.Ed.2d 694 (1981) (hereinafter 'Pennhurst I'), and Congress must not have specifically foreclosed a § 1983 remedy, Middlesex County Sewage Authority v. National Sea Clammers Association, 453 U.S. 1, 20, 101 S.Ct. 2615, 2626, 69 L.Ed.2d 435 (1981)." Hendrickson v. Griggs (N.D. Iowa 1987), 672 F.Supp. 1126 at 1133.

"Recently in Wright v. City of Roanoke Redevelopment & Housing Authority, 479 U.S. 418, 107 S.Ct. 766, 93 L.Ed.2d 781 (1987), the Supreme Court held that the Civil Rights Act, 42 USC § 1983 (1982), does provide housing assistance participants with a private right of action to redress violations of federal housing laws by State officials." Holly v. Housing Authority of New Orleans, E.D.La. 1988, 684 F.Supp. 1363 at 1366.

"In our view, the benefits Congress intended to confer on tenants are sufficiently specific and definite to qualify as enforceable rights under

Pennhurst [State School & Hospital v. Halderman, 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981)] and § 1983 rights are not, as respondent suggests, beyond the competence of the judiciary to enforce." Wright v. Roanoke, *supra*, 107 S.Ct. at 775; *see also* Hill v. Ogburn (U.S.C.A. 11th Cir.) 1987, 812 F.2d 679 at 681.

Third party beneficiary claim:

"The ACC (Annual Contributions Contract), which is entered into pursuant to the Housing Act, does exhibit an intention to benefit the tenant, directly. The provisions of the ACC make clear that it was executed primarily for the purpose of benefiting the tenants (citing cases). The ACC requires that defendants BHA and Craig provide decent, safe, and sanitary housing. Moreover, the language of the Housing Act and its legislative history demonstrate that the Congress intended that the regulatory contracts entered into pursuant to the Act were designed to benefit the tenants as a mechanism for ensuring that they receive decent and safe housing. See 42 USC § 1437 *et seq*. 'Indeed, it is difficult to imagine any purpose for the contract other than to benefit tenants of public housing.' Ashton [v. Pierce, 716 F.2d 56 at 66 (D.C.Cir. 1983)]." Concerned Tenants of Father Panik Village v. Pierce (D.Conn. 1988), 685 F.Supp. 316 at 323; *see also* Hill v. Ogburn, *supra*, 812 F 2d at 681.

In this case the Washington Courts erred in requiring higher than a negligence standard for claims under 42 USC § 1983 (A-17, 26) (Starstead v. City of Superior, 1982 U.S.D.C., W.D.Wis.), 533 F.Supp. 1365, 1371 note 5; Pratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981)), and in applying Washington's Statute of Repose, RCW 4.16.300 to bar petitioner's federal, non-constitutional claims (A-12,13), including third party beneficiary claims through Sec. 1983 for breach of

HUD statutes and regulations and contracts.

The Statute of Repose of the State of Washington applies to the "accrual" of a cause of action and effectively states that no cause of action may accrue six years after the completion of construction. This is directly in conflict with and is preempted by federal law:

> "While the time limitation itself is borrowed from state law, the federal rule fixes the time of accrual of a right of action. Cox v. Stanton (4th Cir. 1975), 529 F.2d 47, at page 50. This federal rule establishes the time of accrual as the time when the plaintiff knows or has reason to know of the injury which is the basis of his action." Bireline v. Seagon Dollar (4th Cir. 1977), 567 P.2d 260 at 263.
>
> "Federal law determines when a claim accrues under § 1983. . . We held that the federal claim accrues when the plaintiff 'knows or has reason to know' of the injury that is the basis of his action." Pauk v. Board of Trustees of City University of New York (USCA 2nd Cir. 1981), 654 F.2d 856 at 859.
>
> "Because Congress has not provided a federal statute of limitations for actions brought under § 1983, we must apply the most appropriate state statute of limitations." Id., 654 F.2d at 861.
>
> "A federal court, searching for an analogous state limitation for a § 1983 suit should not select any period shorter than the two years Congress has specified as the time within which notice must be given of claims against the United States for unlawful actions by federal law enforcement officers. 28 USC §§ 1346(b), 2680(h), 1976." Id., 654 F.2d at 862.

"It would be analogous for a federal court to apply a state policy restricting remedies against public officials to a federal statute that is designed to augment remedies against those officials, especially a federal statute that afford remedies for the protection of constitutional rights." Id., 654 F.2d at 862.

"But determination of an appropriate statute of limitations applicable to a federal cause of action is a 'matter of federal law'. (citing cases) We would not be applying federal law if we automatically deferred to New York's view, whether expressed by its courts or its legislature, as to which limitation the state thought was appropriate for a § 1983 claim." Id., 654 F.2d at 865; *see also* Bireline v. Seagon Dollar (C.A.N.C. 1977), 567 F.2d 260, *cert. den.*, 100 S.Ct. 831, 444 U.S. 842, 62 L.Ed.2d 54; Monell v. New York City Dept. of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); Hendrickson v. Griggs (N.D.Iowa 1987), 672 F.Supp. 1126.

2. Can the City avoid the responsibility to provide safe housing under HUD funding regulations and contract by creating a Housing Authority?

This case presents an important Public Policy issue which requires the determination by this High Court. The Executive Branch, through HUD and its Auditor, as shown from the quote from his Audit Report of one of the City of Tacoma's Housing Authorities (pages 1-2, above), takes the position that the City has a non-delegable duty to comply with HUD regulations. The Supreme Court of the State of Washington disagrees. The resolution by this High Court of this issue will have the broadest impact upon the relation between the Federal Government and the

States and their political subdivisions.

The City of Tacoma has gone to great lengths to create "independent" corporations to perform many of its functions, one being the receipt of funds from the Department of Housing and Urban Development to construct, alter and operate subsidized housing in the City of Tacoma. However, the HUD regulations require the City to retain the responsibility for complying with the requirement to provide safe housing. (See 24 CFR 570.700(b); § 570.701; § 570.702.)

24 CFR 850.3 Definitions.

> ""Grantee" means the government to which a grant is awarded and which is accountable for the use of the funds provided. The grantee is the entire legal entity, even if only a particular component of the entity is designated in a grant award document."

24 CFR 850.40(a) Monitoring by Grantees.

> "Grantees are responsible for managing the day-to-day operations of grant and sub-grant supported activities. Grantees must monitor grant and sub-grant supported activities to assure compliance with applicable federal requirements and that performance goals are being achieved. Grantee monitoring must cover each program, function, or activity. . . ."

24 CFR 570.700(b).

> "Public agencies may be designated by eligible units of general local government to receive a loan guarantee on notes or other obligations issued by the public agency in accordance with this sub-part. In such case the applicant unit of general local government shall be required to pledge its current and future grants under the Act as security for the notes or other obligations issued by the public agency."

The requirement to provide safe housing cannot be avoided

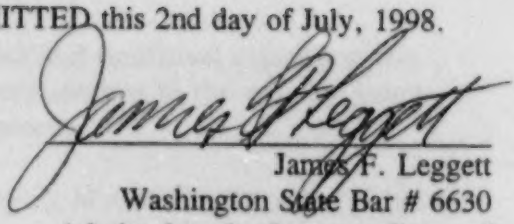
by the City by merely choosing to create a quasi-municipal agency, the directors of which it appoints, and the activities of which it limits to fulfilling the City's purpose of acquiring and operating HUD subsidized dwellings.

> "It is a well-recognized principle of law that a corporation may not be used as a cloak or disguise to escape corporate liability, and that the corporate veil may be pierced when necessary to justice in a particular case. . . .
>
> The rule followed in many cases is that the legal fiction of distinct corporate existence may be disregarded where a corporation is so organized and controlled, and its affairs are so conducted, as to make it merely an instrumentality or adjunct of another corporation." Superior Portland Cement, Inc. v. Pacific Post Cement Co., Inc., 33 Wash.2d 169, 212, 105 P.2d 597, 620 (1949); *see also* Thomas v. Housing Authority of City of Bremerton (1967 Wash.), 426 P.2d 836 at 841.
>
> "Unless the obligee agrees otherwise, neither delegation of performance nor a contract to assume the duty made with the obligor by the person delegated discharges any duty or liability of the delegating obligor." Restatement (2.d) Contracts § 150(3).

Relief Requested.

Petitioner prays this High Court to grant Certiorari, reverse the Washington Supreme Court's dismissal of petitioner's federal claims, and remand her federal claims for trial.

RESPECTFULLY SUBMITTED this 2nd day of July, 1998.



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APPENDIX

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(d) Citations of the official and unofficial reports of the opinions and orders entered in the case by courts or administrative agencies

1. Order Denying Motion for Summary Judgment of the Defendant City of Tacoma, 10 August 1990

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

SHIRLEY C. CAIN, individually and as Personal Representative of the Estates of BRIAN KEITH THOMPSON, GREGORY ALLAN HERLITZKA, HERLITZKA, LYNETTE LORRAINE HERLITZKA, and CYNTHIA S. HERLITZKA, deceased, Plaintiff, vs. THE CITY OF TACOMA, a Corporation and its TACOMA HOUSING AUTHORITY, and DOES I THROUGH V, inclusive, Defendants.	NO. 89 2 01419 5 ORDER DENYING MOTION FOR SUMMARY JUDGMENT OF THE DEFENDANT CITY OF TACOMA

I. HEARING

This matter having come on regularly for hearing before the above-entitled court on the 13th day of July, 1990, notice of hearing having been provided as required by CR 56, the Plaintiff Cain appearing by her attorney of record, James F. Leggett, the other Plaintiffs not appearing, the Defendant City of Tacoma appearing by its counsel of record, Pat Bosmans and Edward Winskill and the Defendant Tacoma Housing Authority appearing by its attorney of record, F. Ross Burgess, for the purpose of considering the Defendant City of Tacoma's motion for summary judgment, the hearing of which had been continued by court order until this date.

The following documents and evidence were submitted to and considered by the court:

1. Affidavit of Bernard Blackburn, dated 9 July 1990
2. Affidavit of Charles Pearson, dated 6 March 1990
3. Supplemental Affidavit of William Larkin IV, dated 21 February 1990
4. Supplemental Affidavit of Stanley L. Thaut
5. Affidavit of Stanley L. Thaut, dated 31 January 1990
6. Affidavit of William Larkin IV, dated 26 January 1990
7. Plaintiff Cain's Third Amended Complaint
8. Defendant City of Tacoma's answer to Third Amended Complaint
9. City of Tacoma's Motion for Summary Judgment, dated 27 November 1989
10. City of Tacoma's Memorandum of Authorities, dated 27 November 1989
11. City's reply to Motion to Continue Summary Judgment, dated 5 December 1989
12. City's Memorandum of Authorities, dated 6 February 1990
13. City's Motion for Summary Judgment, dated 6 February 1990
14. Affidavit of Alonzo D. Foote, Sr., dated 21 February 1990
15. Affidavit of Patricia Bosmans in Opposition to Plaintiff's Motion to Continue, dated 21 February 1990
16. Reply Memorandum to Plaintiff's Memorandum in Opposition to City's Motion for Summary Judgment
17. Memorandum in Response to Plaintiff's Memorandum in Opposition to Defendant City of Tacoma's Motion for Summary Judgment, dated 6 July 1990
18. Affidavit of Benjamin Thompson, dated 9 July, 1990
19. Affidavit of Counsel in Opposition to Motion for Terms for Abuse of Process, 20 November, 1989, and attachments;
20. Plaintiff's Memorandum in opposition to Motion for Summary Judgment, dated 3 July, 1990
21. Plaintiff's Motion for Partial Summary Judgment, dated 30 November 1989 and supporting affidavits;

22. Attorney's Affidavit Regarding Building Plans, 5 December, 1989, and attachments;
23. Plaintiff's Memorandum in Opposition to Defendant City of Tacoma's Motion for Summary Judgment, 1 December 1989
24. Plaintiff's Supplemental Citation of Authority, dated 6 December, 1989 and attachments;
25. Affidavit of Edward J. Carlson, dated 12 December, 1989, and attachments;
26. Plaintiff's First Requests for Admission to Defendant City of Tacoma and answers thereto, dated 20 December 1989;
27. Plaintiff Is Motion for Continuance of Hearing on Summary Judgment and attachments thereto, dated 13 February 1990;
28. Supplemental Memorandum Concerning 42 USC §1983, 11 March 1990;
29. Attorney's Supplemental Affidavit in Support of Motion for Continuance CR 56(f) and attachments, 23 March, 1990;
30. Memorandum in opposition to City of Tacoma's Motion for Summary Judgment and in Support of CR 56(f) Continuance and attachments, 20 February, 1990;
31. Declaration of Otto Charles Sangder and attachments thereto dated 28 June 1990;
32. Declaration of Edward Carlson and attachments thereto, dated 3 July 1990.

II ORDER

The Court, having considered the evidence and argument of Counsel and being otherwise fully advised in the premises, it is hereby ordered that the Defendant City of Tacoma's Motion for Summary Judgment is hereby denied.

DONE IN OPEN COURT this 10th day of Aug., 1990.

/s/ Nile E. Aubrey, Judge

Presented by:
/s/ James F. LEGGETT,
Attorney for Plaintiff

Approved as to Form, Notice of Presentation Waived:
/s/ Patricia Bosmans, Assistant City Attorney

[footer for firm of *Leggett & Kram*]

2. Stipulation for and Order of Dismissal between Respondent and Tacoma Housing Authority, 6 February 1991

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION II

SHIRLEY C. CAIN, individually and as Personal Representative of the Estates of BRIAN KEITH THOMPSON, GREGORY ALLAN HERLITZKA, LYNETTE LORRAINE HERLITZKA and CYNTHIA S. HERLITZKA, deceased, Respondent, and THE CITY OF TACOMA, a Municipal Corporation, Petitioner, and TACOMA HOUSING AUTHORITY, a Municipal corp. and DOES I THROUGH V, inclusive, Defendants.	NO. 14233-3-II STIPULATION FOR AND ORDER OF DISMISSAL BETWEEN RESPONDENT AND TACOMA HOUSING AUTHORITY

COME NOW the respondent (plaintiff) and the defendant TACOMA HOUSING AUTHORITY, a/k/a HOUSING AUTHORITY OF THE CITY OF TACOMA, by and through their attorneys of record pursuant to CR 41(a)(1)(A) an hereby stipulate and agree that the matters between them which are in part the subject matter of the above-entitled litigation have been fully settled and compromised and may be dismissed with prejudice and without costs. The parties to this stipulation agree that the resolution of the claims between them and which are in part the subject matter of the above-entitled litigation is not intended to benefit the City of Tacoma or any other party responsible to plaintiff because of the incident in question. The respondent relies upon paragraph I.1

[footer for firm of *Burgess, Fitzer, Leighton, et al.*]

of the City of Tacoma's answer to plaintiff's third amended complaint dated January 11, 1990 and signed by Patricia Bosmans, assistant city attorney, and specifically does not release or dismiss the City of Tacoma from any claim she may have against the City of Tacoma including agency claims.

The settlement proceeds received from TACOMA HOUSING AUTHORITY, a/k/a HOUSING AUTHORITY OF THE CITY OF TACOMA shall be disbursed as follows:

1. $2,000 for independent claims of Shirley C. Cain;
2. $37,000 for the estate of Brian Keith Thompson;
3. $37,000 for the estate of Gregory Allan Herlitzka;
4. $37,000 for the estate of Lynette Lorraine Herlitzka, and
5. $37,000 for the estate of Cynthia S. Herlitzka.

DATED this 6th day of February, 1991.

Leggett & Kram, /s/ James F. Leggett Burgess, Fitzer, et al.
/s/ F. Ross Burgess

ORDER

THIS MATTER coming on to be heard before the undersigned judge of the above-entitled court based upon the foregoing stipulation of the respondent (plaintiff) and defendant TACOMA HOUSING AUTHORITY, a/k/a HOUSING AUTHORITY OF THE CITY OF TACOMA for dismissal, and the court being fully advised in the premises, it is hereby

ORDERED, ADJUDGED AND DECREED that the above-entitled matter relative to the respondent (plaintiff) and the defendant TACOMA HOUSING AUTHORITY, a/k/a HOUSING AUTHORITY OF THE CITY OF TACOMA be, and the same is hereby dismissed with prejudice and without co

DONE IN OPEN COURT this 6 day of February, 1991.

/s/ Commissioner Meath

Presented by:
/s/ F. Ross Burgess, WSB #3092
Attorneys for Defendant Tacoma Housing Authority, a/k/a Housing Authority of the City of Tacoma

3. Unpublished Opinion of Division II of the Court of Appeals of the State of Washington, 31 January 1994, 72 Wn.App. 1042

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SHIRLEY C. CAIN, individually and as Personal Representative of the Estates of BRIAN KEITH THOMPSON, GREGORY ALLAN HERLITZKA, LYNETTE LORRAINE HERLITZKA and CYNTHIA S. HERLITZKA, deceased, Plaintiff,	)	No. 14233-3-II
v.	)	DIVISION TWO
THE CITY OF TACOMA,a Municipal Corporation, and the TACOMA HOUSING AUTHORITY, and DOES I THROUGH V, inclusive, Defendants.	)	UNPUBLISHED OPINION
	)	Filed:January 31, 1994

ALEXANDER, J. -- The City of Tacoma (City) obtained discretionary review of an order of the Pierce County Superior Court denying its motion for a summary judgment to dismiss Shirley Cain's action against it for failing to enforce applicable building and fire codes and HUD regulations. We reverse in part.

The Conifer Apartments, located in Tacoma, were constructed in 1969 by a private developer. The Housing Authority of the City of Tacoma acquired the apartment house sometime prior to 1979 as a housing facility for low income persons. Apparently, the Housing Authority's operation of the apartments was subsidized by "loans and annual contributions" from the United States Department of Housing and Urban Development (HUD). The City claims that the Housing Authority is a separate and distinct legal entity over which the City has no control or authority. Cain does not refute that

contention, however, she asserts that the City bears the ultimate responsibility for ensuring compliance with HUD regulations, as well as applicable building and fire codes.

In the late 1970's, the Conifer Apartments were substantially repaired and renovated.[1] As a part of that project, balconies off bedrooms on the upper floors of some of the units were enclosed. Each enclosed area contained a window, the size of which is not clear from the record. Prior to the renovation, the balconies had provided a means of emergency egress from upper floor bedrooms by affording occupants of the bedrooms access to balconies off other units.

In 1979, after the renovation was completed, the apartment house was inspected by the City's building department and a certificate of occupancy issued. In September 1987, the City's Fire Department inspected the apartments and concluded that they were in compliance with applicable fire codes of the City of Tacoma.

In January 1988, a fire broke out at the Conifer Apartments, and four persons were killed. Cain is the mother of one of the deceased persons and the grandmother of the other three. City Fire Department inspectors examined the building shortly after the fire and concluded that it complied with city fire codes that were in effect at the time of the fire.

On January 5, 1990, Cain, individually and as the personal representative of the estates of the four persons killed in the fire, filed a wrongful death/survival action in Pierce County Superior Court against the City and the Housing Authority. Cain claimed that her child and three grandchildren died as a result of being trapped in an upper floor bedroom of their apartment as the fire raged through that apartment. In her complaint for damages, Cain claimed that the defendants had liability: (1) pursuant to 42 U.S.C. § 1983 for denial of the

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[1]The Conifer Apartments are also referred to in the record as "Hillside Terrace" and as the "Conifer 5 Project." Presumably, the latter name referred to the remodeling project.

decedents' civil rights; (2) for strict premises liability; and (3) for their failure to adequately enforce applicable building and fire codes and HUD regulations. Cain's cause of action, insofar as it implicated the City,[2] was based almost entirely on allegations that there were insufficient smoke detectors in the apartment, and an absence of a second exit from the upper floor.[3] These conditions, according to Cain, violated the City's building and fire codes as well as HUD's "Minimum Property Standards for Multifamily Housing".

The City moved for summary judgment claiming that (1) it had never owned or operated the Conifer Apartments, (2) the public duty doctrine immunized it from liability for suits based upon alleged negligent enforcement of building and fire codes, and (3) Cain's claims were barred, at least in part, by RCW 4.16.300-320, the so-called "statute of repose". It also argued that Cain's 42 U.S.C. § 1983 claim was without merit, even assuming negligence by the City, because (1) conduct that is merely negligent does not amount to a deprivation of constitutional rights, and (2) the City's alleged actions did not constitute official policies or customs of the City.

> The City's motion was denied, the trial judge stating: [I]t seems to me there [are] disputed facts in this case . . . . [Cain's attorney's] experts indicated there were things there not complied with. And the affidavits from the people from the City indicate they . . . complied with the applicable building codes. But it seems to me there is a question of fact as to whether they did or not . . . I don't believe that the window is actually an

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[2] While this appeal was pending, Cain agreed to a voluntary dismissal of her claim against the Housing Authority.

[3] Cain also claimed that the City had liability because it improperly maintained trees and terracing on the grounds of the complex, asserting that this condition prevented ready access to the fire by firefighters and their equipment. The parties have not discussed this issue in their briefs and, therefore, we have not addressed it.

> exit as defined by the building code. There wasn't any smoke detector or alarm in the living room. I think there [are] genuine issues of fact to preclude this court from granting the City's motion . . . .

The City, thereafter, petitioned this court for discretionary review and we granted it.

The underlying issue is whether the trial court erred in denying the City's motion for summary judgment. Summary judgment motions are reviewed de novo by the appellate court. *Nevue v. Close*, 67 Wn.App. 635, 637, 838 P.2d 132 (1992), *review granted*, 121 Wn.2d 1008 (1993). Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file, when viewed in the light most favorable to the nonmoving party, demonstrate that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. CR 56; *see also Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). A material fact is one upon which the outcome of the litigation depends. *Nationwide Mutual Fire Ins. Co. v. Watson*, 120 Wn.2d 178, 186, 840 P.2d 851 (1992) *(citing Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977)).

In denying summary judgment, the trial court concluded that there were triable issues of fact relating to Cain's claims against the City. Cain's claims rested on two separate events: (1) The inspection conducted by the City's building department in 1979, following the remodeling of the Conifer Apartments, and (2) the 1987 inspection of the apartments conducted by the City's fire department. Cain asserts generally that: the Conifer Apartments were not in compliance with applicable building codes, fire codes, and HUD regulations at the time the City performed its 1979 and 1987 inspections because, at that time, the unit in which the deaths occurred had only one exit instead of two, and only one smoke detector instead of two; the City bears ultimate responsibility for ensuring compliance with those codes and regulations; and the City is liable for inadequately enforcing the applicable codes and regulations.

I. STATUTE OF REPOSE

The City contends that the trial court erred in not granting its motion for summary judgment, at least in part, on the basis that some of Cain's claims were barred by the provisions of RCW 4.16.310. It argues that any of Cain's non-constitutional claims against it based on its alleged failures in the 1979 inspection of the Conifer Apartments are barred by that statute, because over 6 years have passed since it completed that inspection.

RCW 4.16.310, commonly referred to as a statute of repose, provides, in part, that:

> [a]ll claims or causes of action as set forth in RCW 4.16.300 shall accrue, and the applicable statute of limitation shall begin to run only during the period within six years after substantial completion of construction, or during the period within six years after the termination of the services enumerated in RCW 4.16.300, whichever is later. The phrase "substantial completion of construction" shall mean the state of completion reached when an improvement upon real property may be used or occupied for its intended use. Any cause of action which has not accrued within six years after such substantial completion of construction, or within six years after such termination of services, whichever is later, shall be barred: **PROVIDED**, That this limitation shall not be asserted as a defense by any owner, tenant or other person in possession and control of the improvement at the time such cause of action accrues . . . .

RCW 4.16.300, which is referred to in the above statute, describes the types of claims covered by RCW 4.16.310. it states, in part, that:

> RCW 4.16.300 through 4.16.320 shall apply to all claims or causes of action of any kind against any person, arising from such person having constructed, altered or repaired any improvement upon real property, or having performed or furnished any design, planning,

surveying, architectural or construction or engineering services, or supervision or *observation* of construction . . .

(Italics ours).

The City, while acknowledging that it was not a contractor, engineer, designer or architect, contends that the statute of repose insulates it from Cain's state law based claims arising from its 1979 inspection of the remodel because it was an observer of the remodeling project. To determine if the City performed "observation" of the premises in question, it is necessary for us to determine the meaning of the above statutes. In construing the meaning of a statute, we read the statute as a whole. See *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 293, 840 P.2d 860 (1992). Additionally, a statute is to be given its plain meaning and absurd results are to be avoided. *See State v. Kenney*, 52 Wn.App. 193, 195, 758 P.2d 989 (1988). All language in the statute should be given effect. *See Clark v. Pacificorp*, 118 Wn.2d 167, 183, 822 P.2d 162 (1991). Furthermore, a statute should not be interpreted in such a manner as to render any portion meaningless, superfluous or questionable. *See Estate of Telfer v. County Comm'rs*, 71 Wn. App. 833, 836, P.2d (1993).

Although the term "observation" is not defined in RCW 4.16.300, we believe that it is logical to presume that the legislature intended that the term would apply to the observation of premises in connection with official inspection activities. We reach this conclusion because we believe that when the term "observation" is viewed in the context of the rest of RCW 4.16.300, it makes no sense to construe that term as applying to casual observers. Certainly, the Legislature intended that it apply to some activity. If it did not apply to persons observing property in connection with an official inspection, we can think of nothing it would pertain to. Accordingly, we conclude that Cain's non-constitutional claims against Tacoma arising from the 1979 inspections are time-barred. The trial court, therefore, erred in not granting summary judgment for the City on those claims.

II. 42 U.S.C. § 1983 CLAIM

The City contends that Cain's 42 U.S.C. § 1983 claim lacks merit because Cain did not make a sufficient showing of a constitutional deprivation. Cain responds that the City's failure to adequately enforce applicable codes and regulations amounted to a constitutional deprivation because it deprived the decedents of their right to life. We disagree. At most, the record before us suggests that the City may have negligently failed to enforce certain code provisions and HUD regulations. Mere negligence by a government actor does not automatically give rise to a private cause of action under 42 U.S.C. § 1983. *See e.g. Daniels v. Williams*, 474 U.S. 327, 329-36, 88 L.Ed.2d 662, 106 S.Ct. 662, 677 (1986) (negligent act of sheriff's deputy resulting in injury to inmate does not give rise to § 1983 claim); *Davidson v. Cannon*, 474 U.S. 344, 347-48, 88 L.Ed.2d. 677, 106 S.Ct. 668 (1986).

Cain argues, additionally, that under 42 U.S.C. § 1983, she has a private cause of action against the City for its failure to enforce applicable HUD regulations even without a showing of a constitutional deprivation. Even assuming that Cain's assertion is correct, we are satisfied that no cause of action lies for the City's alleged failure to enforce applicable HUD regulations absent a showing that the City was obligated to enforce those provisions. Cain has made no such showing.

Cain contends that a "cooperation agreement" executed in the early 1970's between the City and The Housing Authority obligated the City to enforce applicable HUD regulations and subjected it to liability for failing to do so. In our view, the agreement Cain refers to does not contain any language that obligates the City to enforce HUD regulations.[4]

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[4] On July 21, 1970, the Tacoma City Counsel adopted resolution 20733 which authorized and directed the City of Tacoma to execute a cooperation agreement with the Housing Authority of the City of Tacoma (hereafter Housing Authority). An agreement was executed on August 18, 1970. Pursuant to that agreement, the Housing Authority (aka "local authority"), was to:

Moreover, even assuming that the agreement did obligate the City to enforce applicable HUD regulations in 1987, the agreement does not specify whether it applied to the Conifer Apartments.

Cain asserts, further, that the City is liable for the Housing Authority's failure to comply with applicable HUD regulations, arguing that pursuant to 24 CFR § 570.700, ultimate responsibility for ensuring compliance with those regulations lies with the City and cannot be delegated. Even assuming that the Housing Authority was obligated to comply with HUD regulations and that those regulations required second exits and smoke detectors, we do not believe that 24 CFR § 570.700 renders the City liable for the Housing Authority's non-compliance with those regulations. The 1987 version of 24 CFR § 570.700, which was applicable at the time of the 1987 fire inspection, states that:

> (a) Units of general local government entitled to receive a grant under section 106(b) of the Act (metropolitan cities and urban counties) may apply for loan guarantee assistance under this subpart.
>
> (b) Public agencies may be designated by eligible units of..... local government to

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> endeavor (a) to secure . . . contracts with the Government for loans and annual contributions covering one or more Projects comprising approximately 200 units of low-rent housing and (b) to develop and administer such Project or Projects . . . .

Among other things, the City (aka "municipality") agreed to give the projects certain tax exemptions; eliminate a number of unsafe or unsanitary dwelling units by demolition, condemnation, closing, or compulsory repair; and in so far as it may lawfully do so,

> (i) grant such deviations from the building code of the Municipality as are reasonable and necessary to promote economy and efficiency in the development and administration of such Project, and at the same time safeguard health and safety . . . .

> receive a loan guarantee on notes or other obligations issued by the public agency in accordance with this subpart. In such case the applicant unit of . . . local government shall be required to pledge its current and future grants under Title I as security for the notes or *other obligations* issued by the public agency.

(Italics ours). The regulation appears to us to merely require the City to secure financial obligations of designated public agencies. In support of her contention that 24 CFR 570.700 requires the City to ensure compliance with HUD regulations pertaining to exits and smoke detectors, Cain refers to a July 13, 1990 Inspector General's Office report which includes the following language:

> 24 CFR 570.700 states that designation of a public agency (e.g. The Municipal Authority) to administer Section 108 activities does not relieve the City of its responsibilities in assuring the administration of the program in accordance with all HUD requirements.

We are unpersuaded by Cain's contention and the portion of the Inspector General's report cited above. First, the report does not specify what version of 24 CFR 570.700 it is referring to. Furthermore, we have not been cited to a version of that regulation which contains language that is consistent with the report.[5] As we have noted, the 1987 version of 24 CFR 570.700 refers only to the responsibility of local government entities for the financial obligations of designated public agencies. Accordingly, while 42 U.S.C. § 1983 may provide people living in public housing with a private right of action against state and local officials for violations of federal housing laws and regulations, *see e.g. Wright v. Roanoke Redevelopment and Hous. Auth.*, 479 U.S. 418, 423, 93 L.Ed.2d 781, 107 S.Ct. 766 (1987), we are satisfied that no such action lies absent

[5] Our substantial independent efforts to locate such a version were unsuccessful.

a showing that the officials are under a duty to the federal provisions. Cain has made no such showing. Consequently, the trial court erred in not granting summary judgment to the City dismissing Cain's 42 U.S.C. § 1983 claim.

III. PUBLIC DUTY DOCTRINE AS BAR TO CLAIMS BASED ON THE 1987 FIRE INSPECTION

Although we have concluded that the trial court erred in not dismissing Cain's claims arising from the 1979 inspections and those based on 42 U.S.C. § 1983, an issue remains as to whether it erred in not granting summary judgment for the City on Cain's claim that the City negligently performed its 1987 fire inspection. The City claims that Cain's claim is barred by the so-called "Public Duty Doctrine". Under that doctrine, the duties of public officers are owed to the public at large and, thus, will not generally support a cause of action by an injured individual. *See Bailey v. Forks*, 108 Wn.2d 262, 265-66, 737 P.2d 1257 (1987), *amended by*, 753 P.2d 523 (1988); *Chambers-Castanes v. King Cy.*, 100 Wn.2d 275, 284, 669 P.2d 451 (1983). There are, however, exceptions to the general rule. *See e.g. Atherton Condo Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 531, 799 P.2d 250 (1990); *Taylor v. Stevens Cy.*, 111 Wn.2d 159, 164, 759 P.2d 447 (1988); *Bailey*, 108 Wn.2d at 268.

Cain contends that she is entitled to sue the City under the "legislative intent" and "failure to enforce" exceptions to the public duty doctrine. The "legislative intent" exception to the general rule applies when the terms of a legislative enactment evidence a clear intent to identify and protect a particular and circumscribed class of persons. *See e.g. Halvorson v. Dahl*, 89 Wn.2d 673, 676, 574 P.2d 1190 (1978). In *Halvorson*, the widow of a man killed in a hotel fire brought a wrongful death action against the City of Seattle for failing to enforce applicable building and fire codes. *See Halvorson*, 89 Wn.2d at 674. In concluding that the plaintiff's suit was not barred by the Public Duty Doctrine, the Court stated:

> The traditional rule has an exception . .

> . which is applicable in this case. Liability can be founded upon a municipal code if that code by its terms evidences a clear intent to identify and protect a particular and circumscribed class of persons . . . . The Seattle Housing Code is such a statute . . . .
>
> . . . While most codes are enacted merely for purposes of *public* safety or for the *general* welfare, this section identifies conditions and circumstances . . . dangerous and a menace to the health, safety, morals or welfare of *the occupants of such buildings* and of the public . . . . The Seattle Housing Code is an ordinance enacted for the benefit of a specifically identified group of persons as well as, and in addition to, the general public.

(Citations omitted. Footnote omitted. Italics theirs.) *Halvorson*, 89 Wn.2d at 676-77.

Cain contends that the decedents, as tenants of public housing, were within the class of persons which Tacoma's housing and fire codes were clearly intended to protect and that, accordingly, the legislative intent exception permits her suit. We agree.

Tacoma's Supplementary Life Safety Code exists "to provide a reasonable degree of life protection from the effects of fire, if Tacoma, WA., Code § heat, or smoke in apartments . . . ." Tacoma, WA., Code § 3.05.010 (1984). Among other things, the code requires dwelling units and guest rooms to have two exits. Tacoma, WA., Code § 3.05.040 (1984). In our view, clear intent behind the city council's requirement for two exits is to protect occupants of those units more so than the general public, because the occupants are most at risk of harm from fires within their apartments. Accordingly, we are satisfied that Cain is not barred from maintaining her lawsuit against the City based on the 1987 inspection. Because of this conclusion, we need not address the failure to enforce exception.

IV. FACTUAL ISSUES CONCERNING THE CITY'S NEGLIGENCE

Having concluded that Cain is not barred from maintaining this lawsuit against the City, we must next determine whether, as the City asserts, there is no factual issue concerning Cain's claim that the City negligently performed the fire inspection in 1987. Cain claims that the apartment in which her child and grandchildren resided was out of compliance with city fire codes when it was inspected in 1987 because it lacked a second exit and a second smoke detector; and that the City, in conducting that inspection, negligently failed to observe the code violations and take steps to correct them. Contrary to Cain's contention, we find no provision in any applicable fire code of the City requiring a second smoke detector. As noted above, City codes require two exits, however, a window can, in some instances, satisfy the second exit requirement, provided it meets certain size specifications. See Tacoma, WA., Code § 3.05.040 (1984).[6] We are unable, however, to ascertain from the record whether the window in the apartment satisfied the requirements of the ordinance. If it did, there was no negligence on the part of the City.

In conclusion, because under certain circumstances a window can qualify as a second exit, a factual issue exists as to whether the City failed to enforce the applicable fire code provisions when it conducted the 1987 inspection. Consequently the trial court's conclusion that a factual dispute existed as to

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[6] Tacoma, WA., Code § 3.05.040 provides that:

Every dwelling unit or guest room shall have access to at least two (2) exits as defined by the Uniform Fire Code. . .

Exceptions:

. . . .

2. In buildings housing Group R, Division 1 occupancies with three (3) or less communicating floor levels the second exit may be provided . . . by a window located in each . . . sleeping room.. Such windows shall open to provide a minimum clear opening of 5.7 square feet, with a minimum clear width of twenty (20) inches and a minimum clear height of twenty-four (24) inches . . .

whether the City had failed to enforce Tacoma's building and fire codes in 1987 was correct, at least in part. Its judgment is, therefore, affirmed in part. As noted above, we reverse the trial court's denial of the City's summary judgment motion insofar as it relates to Cain's 42 U.S.C. § 1983 claim and her claim that the City failed to adequately enforce applicable codes and regulations during its 1979 inspection. The case is remanded to the Superior Court on the remaining issue in the case.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

/s/ Alexander, J.

We Concur:
/s/ Morgan, C.J.
/s/ Petrie, J. *Pro Tem.*

4. Order Granting Renewed Motion for Summary Judgment, 29 December 1995

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

SHIRLEY C. CAIN, individually and as Personal Representative of the Estates of BRIAN KEITH THOMPSON, GREGORY ALLAN HERLITZKA, HERLITZKA, LYNETTE LORRAINE HERLITZKA, and CYNTHIA S. HERLITZKA, deceased, Plaintiff,	NO. 89 2 01419 5 ORDER GRANTING RENEWED MOTION FOR SUMMARY JUDGMENT
vs. THE CITY OF TACOMA, a Corporation and its TACOMA HOUSING AUTHORITY, and DOES I THROUGH V, inclusive, Defendants.	

THIS MATTER having come on regularly before the above-entitled Court on the 1st day of December 1995, notice of hearing having been provided pursuant to court rule, and the plaintiff appearing by its attorney of record, James F. Leggett, and the defendant City of Tacoma appearing by its attorneys Edward S. Winskill and Patricia Bosmans, for the purpose of considering defendant City of Tacoma's renewed motion for final summary judgment.

The Court was presented and considered the following:

1. 13 Dec 1994 Declaration of Glen Garrett;
2. 21 Dec 1994 Declaration of John Helleman;
3. 23 Dec 1994 Declaration of David Jackson;
4. 6 January 1995 defendant's motion for final summary judgment;
5. 17 January 1995 memorandum in support of defendant's motion for final summary judgment;
6. 17 January 1995 declaration of Edward S. Winskill in

support of defendant's motion for final summary judgment;

7. 25 January 1995 plaintiff's memorandum in opposition to defendant's second motion for summary judgment and attachments;
8. 24 January 1994 declaration of Otto Charles Sangder and attachments, which include the declaration of Otto Charles Sangder dated 28 June 1990 and the Declaration of Edward Carlson dated 3 July 1990;
9. 3 March 1995 City of Tacoma's reply memorandum;
10. 7 March 1995 plaintiff's supplemental memorandum regarding proceedings of trial court after remand;
11. 20 October 1995 defendant City of Tacoma's renewed motion for a final summary judgment;
12. 9 October 1995 affidavit of Richard Kirsop;
13. 29 September 1995 affidavit of Ralph W. Johns;
14. 20 October 1995 declaration of Edward S. Winskill in support of renewed motion for summary judgment;
15. 20 October 1995 defendant's brief in support of renewed motion for final summary judgment;
16. 30 October 1995 memorandum in opposition to defendant City of Tacoma's renewed motion for final summary judgment (note: incorporates by reference motion to strike defendant City of Tacoma's renewed motion for final summary judgment and motion to strike declaration of Ed Winskill);
17. 6 November 1995 defendant's reply brief regarding: (1) motion for summary judgment;
18. 9 November 1 995 plaintiff's supplemental memorandum in opposition to defendant City of Tacoma's motion for final summary judgment and in support of plaintiff's motion to compel;
19. 30 November 1995 historical development of existing requirements and application to City;
20. Affidavit of Richard E. Moore dated 30 November 1995;
21. Affidavit of Richard Kirsop dated 9 October 1995;
22. City of Tacoma's Response to Historical Development of Exiting Requirements and Application to City dated 30

November 1995;

23. Plaintiff's Response to Defendant City of Tacoma's Objection and Motion to Strike Historical Development of Exiting Requirements and Application to City;
24. Plaintiff's Counsel's Supplemental Affidavit to Supplement the Record;
25. Declaration of Ted Werner;
26. Affidavit of Patricia Bosmans, 21 November, 1995;
27. Defendant's Reply to Plaintiff's Response to Defendant City of Tacoma's Objection and Motion to Strike Historical Development of Exiting Requirements and Application to City, 14 December, 1995;
28. Defendant City of Tacoma's Response to Plaintiff's Counsel's Supplemental Affidavit to Supplement the Record, 14 December, 1995.

The Court having considered the argument of counsel, having overruled plaintiff's objection to both counsel for the City of Tacoma addressing the summary judgment motion issues, and being fully advised in the premises, it is hereby

ORDERED that defendant City of Tacoma's renewed motion for final summary judgment shall be and the same hereby is GRANTED.

BASED UPON the foregoing Order, it is hereby

ORDERED, ADJUDGED AND DECREED that the complaint of the plaintiff and the claims stated therein shall be, and the same are hereby DISMISSED WITH PREJUDICE.

DONE IN OPEN COURT this 29th day of December, 1995. /s/ Nile E. Aubrey, Judge

Presented by:
s/s James F. Leggett, WSBA 6630, Attorney for Plaintiff
Approved as to Form:
Patricia Bosmans, WSBA #9148, Senior Assistant City Attorney For Defendant City of Tacoma
Edward S. Winskill, WSBA #5406, Attorney for City of Tacoma

[footer for firm of *Leggett & Kram*]

5. Unpublished Opinion of Division II of the Court of Appeals of the State of Washington, 10 October 1997

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION II

SHIRLEY C. CAIN, individually and as Personal Representative of the Estates of BRIAN KEITH THOMPSON, GREGORY ALLAN HERLITZKA, LYNETTE LORRAINE HERLITZKA and CYNTHIA S. HERLITZKA,deceased, Appellant, v. THE CITY OF TACOMA,a Municipal Corporation and the TACOMA HOUSING AUTHORITY,a Municipal Corp. and DOES I THROUGH V, inclusive, Respondents.	)	No. 21119-0-11 UNPUBLISHED OPINION Filed: Oct 10 1997

BRIDGEWATER, A.C.J.--Shirley Cain appeals the dismissal of her civil rights and negligence claims against the City of Tacoma. We hold that the 1994 Court of Appeals decision dismissing all but one of her claims was correctly decided and that on remand the superior court correctly dismissed her last remaining claim. We affirm.

The Conifer Apartments were built in 1969 by a private developer. The Tacoma Housing Authority acquired the building for use as a low income housing facility and renovated the buildings in the late 1970s. As a part of the renovation of the building, balconies off bedrooms on the upper floors of some of the units were enclosed. Each enclosed area contained a window, which was to serve as a second exit (other than the door to the apartment). The City's building department inspected the building after the renovation was complete and

issued a certificate of occupancy. In September and December 1987, the City's fire department conducted a fire code inspection and found the building to be in compliance.

In January 1988, a fire started in Cain's upstairs apartment and five people were killed in the fire, including Cain's daughter and three grandchildren. Investigators determined that the fire had started in a couch, probably as a result of one of the children playing with a cigarette lighter.

Cain filed suit in January 1990 on her own behalf and as personal representative for the estates of her daughter and grandchildren. Cain's suit alleged that the City of Tacoma, the Tacoma Housing Authority, and five other individual defendants were liable under the following theories: (1) under 42 U.S.C. § 1983 for denial of the decedents' civil rights; (2) for strict premises liability; and (3) for their failure to adequately enforce applicable building and fire codes and HUD regulations. Cain voluntarily settled her claim against the Housing Authority, but persevered in her claim against the City. Cain's action was based primarily on allegations that the smoke detectors were not properly placed and that the apartment did not have a second exit from the upper floor in violation of the United States Department of Housing and Urban Development (HUD) regulations and the Tacoma fire code.

The City moved for summary judgment, arguing that it had no liability because (1) the "statute of repose," RCW 4.16.300 through .320, barred Cain's claims in part; (2) the public duty doctrine barred her negligence claim; and (3) the 42 U.S.C. § 1983 claim was without merit because there was no evidence that the conduct of the City deprived Cain or the decedents of their constitutional rights. The summary judgment motion was denied and the City petitioned this court for discretionary review.

By unpublished decision, noted at 72 Wn.App. 1042 (1994) (*Cain* I), this court held (1) that the statute of repose barred Cain's nonconstitutional claims arising from the 1979 building inspection, (2) that Cain did not show a constitutional deprivation necessary for her 42 U.S.C. § 1983 claim, and (3)

that the public duty doctrine did not bar Cain's negligence claim because the legislative intent exception applied. We held, however, that there was still an existing factual issue of whether the apartment window met the size requirement in the fire code for a second exit. We accordingly dismissed all claims but the negligence claim and remanded the case back to the superior court for a determination on the remaining factual issue.

On remand, the City submitted additional evidence regarding the size of the apartment window and moved for summary judgment. The trial court granted the motion, and Cain appeals that decision, as well as our original decision in her case.[1]

I

Cain's first assignment of error is to the 1994 decision by this court in her case. Cain did not seek review of that decision during the time set forth in RAP 13.4(a). But, where the same case is again before the appellate court following a remand, "[t]he appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same cause and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review." RAP 2.5(c)(2). Under RAP 2.5, "an appellate court may reconsider only those decisions that were clearly erroneous and that would work a manifest injustice to one party if the clearly erroneous decision were not set aside." *State v. Worl*, 129 Wn.2d 416, 425, 918 P.2d 905 (1996).

Cain does not make any argument as to why the 1994 decision was clearly erroneous or why allowing the decision to stand would be a manifest injustice. Instead, Cain again argues the merits of the legal claims disposed of in the 1994 appeal. Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration. *State v. Johnson*,

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[1]This case was appealed directly to the Supreme Court. The Supreme Court transferred it here.

119 Wn.2d 167, 171, 829 P.2d 1082 (1992). Thus, this assignment of error need not be addressed by this court. Nevertheless, an independent review of the arguments addressed in the 1994 decision shows that it was not clearly erroneous.

A

In *Cain* I, we held that Cain's claim based on the City's alleged failure to enforce the building code in the 1979 inspection is barred by RCW 4.16.310. Cain argues that this holding was incorrect because inspections by the City are not covered under RCW 4.16.310. RCW 4.16.300 sets forth all activities covered under the limitation in RCW 4.16.310. This list includes "supervision or observation of construction." These terms are not defined by the statute. *Cain* I held that an official inspection is "observation" within the meaning of the statute. This is a reasonable construction of the statute and the holding is not clearly erroneous.

Cain further argues that even if the action of the City is covered by RCW 4.16.310, the City was "in control" of the premises and thus may not use the statute as shelter from a claim. RCW 4.16.310 states that "this limitation shall not be asserted as a defense by any owner, tenant or other person in possession and control of the improvement at the time such cause of action accrues." Cain's only support for her argument is that the City was in control because it owed a duty to provide housing meeting HUD regulations. Even if this were true, this is not "control" of premises as an owner would have, and thus does not fall within the exception.

Cain also argues that the limitation does not bar her claim because the discovery rule applied and she did not discover the negligence until the fire in 1988. RCW 4.16.310 "enacts . . . a two-step procedure: actions founded upon negligence . . . concerning improvements to real property must be filed within 2 or 3 years of discovery, depending on the type of action but, in any case, discovery must occur within 6 years of substantial completion of the improvement." *Bellevue Sch. Dist. No. 405 v. Brazier Constr. Co.*, 103 Wn.2d 111, 119, 691 P.2d 178 (1984). Cain did not file suit by 1985, which was six

years from the substantial completion of the building, and thus her state claims arising from the 1979 inspection are barred by RCW 4.16.310. Therefore, *Cain* I's holding to that effect is not clearly erroneous.

B

Cain I held that Cain's 42 U.S.C. § 1983 claim must be dismissed because Cain failed show a constitutional violation or a violation of federal law. Cain argues now only that the City violated federal law because it failed to enforce HUD regulations. Cain does not point to any existing federal law creating a cause of action against a city for such a failure, or even that the City had any enforceable duty to follow HUD regulations. Furthermore, Cain has failed to show that the City violated any federal law. Mere negligence on the part of a state official does not violate the due process clause. *Davidson v. Cannon*, 474 U.S. 344, 347, 106 S.Ct. 668, 88 L.Ed. 2d 677 (1986). *Cain* I's dismissal of Cain's § 1983 claim was not clearly erroneous.

II

The *Cain* I court also held that the legislative intent exception to the public duty doctrine applies, but remanded the case to the superior court to determine whether the bedroom window met the Tacoma fire code requirements for a second exit. Cain has not challenged our holding that the legislative intent exception applies, and thus we need not decide if it was clearly erroneous.[2] But, Cain appeals the trial court's subsequent dismissal of her negligence claim against the City on a summary judgment motion.

The familiar standard for review of a summary judgment order appears succinctly in *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982):

> [W]e must engage in the same inquiry as the trial court. *Highline Sch. Dist. 401 v. Port of*

[2]The City has challenged the correctness of this holding, but only in the event that this court finds that one of Cain's challenges to *Cain* I has merit.

Seattle, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976). A summary judgment motion under CR 56(c) can be granted only if the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Barrie v. Hosts of America, Inc.*, 94 Wn.2d 640, 642, 618 P.2d 96 (1980). The court must consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party. *Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co.*, 81 Wn.2d 528, 530, 503 P.2d 108 (1972); *Barber v. Bankers Life & Cas. Co.*, 81 Wn.2d 140, 142, 500 P.2d 88 (1972).

However, a nomnoving party may not rely on speculation or on argumentative assertions that unresolved factual issues remain. After the moving party submits adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact. *Meyer v. University of Wash.*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986). The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. *LaMon v. Butler*, 112 Wn.2d 193, 199, 770 P.2d 1027 (1989).

Under the Tacoma fire code, a window may satisfy the second exit requirement, provided that it meets certain specifications. Tacoma Municipal Code § 3.05.040 (1984) provided that:

> . . . Every dwelling unit or guest room shall have access to at least two (2) exits as defined by the Uniform Fire Code as adopted by Chapter 3.02 of the Official Code of the City of Tacoma.
>
> Exceptions:
>
> . . .

> 2. In buildings housing Group R, Division I Occupancies with three (3) or less communicating floor levels and single common exits which serve an occupant load of ten (10) or less, the second exit may be provided from each dwelling unit or guest room by a window located in each sleeping room which will serve as a means of emergency exit and rescue. Such windows shall open to provide a minimum clear opening of 5.7 square feet, with a minimum clear width of twenty (20) inches and a minimum clear height of twenty-four (24) inches. The sill height for such windows shall not exceed forty-four (44) inches. Existing windows which provide a minimum clear opening of five (5) square feet, and a minimum clear dimension of twenty-two (22) inches in both height and width, with a maximum sill height of forty-eight (48) inches in buildings built prior to May 26, 1981, will be accepted for the purposes of emergency exit and rescue.

Cain concedes that the window met the size requirements of this statute. She argues, however, that the statute imposes a second requirement, that the window "will serve as a means of emergency exit and rescue." She urges review of the superior court's order granting renewed motion for summary judgment and order on reconsideration because it did not follow our instructions on remand.

In our 1994 holding, we clearly held that the size of the window was not clear from the record, that the window can satisfy the second exit requirement depending upon its size, and that we could not ascertain whether it satisfied the requirements.

We held that if it did satisfy the size requirements, then there was no negligence. We remanded for the superior court to determine whether the window met the size requirements, which it did and which Cain concedes. The superior court did not err; it followed our instructions precisely.

Cain did not appeal the holding that if the window met the size requirements that there was no negligence. It became the law of the case. She does not ask for review of this holding nor does she argue that it is clearly erroneous under RAP 2.5(c)(2) and the rule set forth in *Worl*, 129 Wn.2d 416. Her contention is that the superior court did not follow our instructions, not that our holding concerning negligence was wrong. We need not address this issue because it has not been argued and no citations to authority have been made as to why this holding was clearly erroneous.

Therefore, summary judgment dismissing Cain's negligence claim against the City was correct. We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

/s/ Bridgewater, A.C.J.

We concur:
/s/ Morgan, J.
/s/ Armstrong, J.

6. Order Denying Petition for Review by the Supreme Court of Washington, 6 May 1998

THE SUPREME COURT OF WASHINGTON

SHIRLEY C. CAIN, individually and as personal representative of the Estates of Brian Keith Thompson, Gregory Allan Herlitzka, Lynette Lorraine Herlitzka, and Cynthia S. Herlitzka, deceased, Petitioners, v. The CITY of TACOMA, a municipal corporation; THE TACOMA HOUSING AUTHORITY,a municipal corporation; and DOES I THROUGH V, inclusive, Respondents.	NO. 66145-6 **ORDER** C/A NO.21119-0-II

All five members of Department I of the Court [Justice Alexander did not sit and Justice Talmadge sat as Justice Pro Tem] considered the matters set on its May 5, 1998, Motion Calendar, and unanimously agreed that the following order be entered:

Therefore, Chief Justice Barbara Durham directed that this order be entered:

IT IS ORDERED:

That the Petition for Review is denied.

I CERTIFY THAT THIS ORDER WAS ENTERED BY THE COURT ON THIS 6th DAY OF MAY, 1998.
/s/ C.J. MERRITT, CLERK

[Filed stamp]
Supreme Court
State of Washington
98 May 6 P12:16
By C. J. MERRITT
CLERK

(f) Statutes and regulations involved in the case, set out verbatim with appropriate citations:

Amendment XIV to the Constitution of the United States of America:

Section 1: No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

USC and CFR citations:

42 USC § 1437*l*(j)(2)

(2) The Secretary shall issue rules and regulations establishing standards which provide for decent, safe, and sanitary living conditions in low-rent public housing projects and for energy conserving improvements in such projects and which, to the extent practicable, are consistent with the Minimum Property Standards for Multi-Family Housing as they reasonably would be applied to existing housing, except that the Secretary may establish higher standards on a project-by-project basis in such cases where the Secretary deems such higher standards appropriate for furthering the purposes of this section.

42 USC § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

24 CFR 85.3 Definitions:
"Government" means a State or local government or a federally recognized Indian Tribal Government."
"Local government" means a county, municipality, city, town, township, local public authority (including any public and Indian housing agency under the U.S. Housing Act of 1937) school districts, special districts, intrastate districts, council of governments (whether or not incorporated), and any other regional or interstate government entity, or any agency or instrumentality of a local government."
"Grantee" means the government to which a grant is awarded and which is accountable for the use of the funds provided. The grantee is the entire legal entity even if only a particular component of the entity is designated in the grant award document."

24 CFR 85.4 Applicability.
(a) General. Subparts A-D of this part apply to all grants and subgrants to governments. . . .

24 CFR 85.5 All other grants administration provisions or codified program regulations . . . which are inconsistent with this part are superseded . . . .

24 CFR 85.40
(a) Monitoring by grantees. Grantees are responsible for managing the day-to-day operations of grant and subgrant supported activities. Grantees must monitor grant and subgrant supported activities to assure compliance with applicable Federal requirements and that performance goals are being achieved. Grantee monitoring must cover each program, function or activity . . .

24 CFR Chapter 11 § 200.925b
. . . HUD will review each local code submitted under this chapter to determine whether it regulates all of the following areas and subareas:

(a) fire safety; . . .

(5) means of egress (number and distance);

(6) individual unit smoke detectors; . . .

24 CFR § 850.1. Scope and Applicability.

This part implements the housing development grant program contained in §17 of the U. S. Housing Act of 1937. . . . Grants are made on a competitive basis to cities, urban counties, and states acting on behalf of units of general local government. . . .

(a) Owner-grantee agreement . . . The grantee-owner agreement must require the grantee to monitor (where required) and to take appropriate legal action to enforce the owner's responsibilities thereunder . . .

(c) Management and maintenance functions. The owner must perform all management and maintenance functions in compliance with equal opportunity requirements. These function include . . . all ordinary and extraordinary maintenance and repairs, including replacement of capital items.

24 CFR § 850.3. Definitions:

"Government" means a state or local government or a federally-recognized Indian tribal government.

"Local government" means a county, municipality, city,, town, township, local public authority (including any public and Indian housing agency under the U. S. Housing Act of 1937), school district, special districts, intrastate districts, council of governments (whether or not incorporated), and any other regional or interstate government entity, or any agency or instrumentality of a local government.

"Grantee" means the government to which a grant is awarded and which is accountable for the use of the funds provided. The grantee is the entire legal entity, even if only a particular component of the entity is designated in a grant award document.

"Applicant" means a city, urban county, or state acting on behalf of a unit of general local government located within

the state that submits an application for a housing development grant under this part. . . .

"Unit of general local government" means any city, county, town, township, parish, village, or other general-purpose political subdivision of the state."

24 CFR § 850.4. Applicability.

(A). General. Sub-parts A-D of this part apply to all grants and sub-grants to government. . . .

24 CFR § 850.5. All other grants administration provisions or codified program regulations . . . which are inconsistent with this part are superseded. . . .

24 CFR § 850.40(a). Monitoring by Grantees. Grantees are responsible for managing the day-to-day operations of grant and sub-grant supported activities. Grantees must monitor grant and sub-grant supported activities to assure compliance with applicable federal requirements and that performance goals are being achieved. Grantee monitoring must cover each program, function, or activity. . . .

24 CFR § 850.151(a). Owner-Grantee Agreement . . . The Grantee-Owner Agreement must require the grantee to monitor (where required) and to take appropriate legal action to enforce the owner's responsibilities thereunder . . .

(c) Management and maintenance functions. The owner must perform all management and maintenance functions in compliance with equal opportunity requirements. These functions include . . . all ordinary and extraordinary maintenance and repairs, including replacement of capital items."

24 CFR § 570.1. Purpose. (a) This part describes policies and procedures applicable to the following programs authorized under Title I of the Housing and Community Development Act of 1974, as amended:

(1) Entitlement grants program (d);
(2) Small cities program: HUD-administered CDBG non-entitlement funds (f);
(3) State program: state-administered CDBG non-entitlement funds (1);
(4) Secretary's Fund Program (E);
(5) Urban Development Action Grant Program (G); and
(6) Loan Guarantees (M).

24 CFR § 570.3. Definitions.

Act means Title I of the Housing & Community Development Act of 1974 as amended, 42 USC § 5301 *et seq.*

Applicant means a state, unit of general local government, or an Indian tribe which makes application pursuant to the provisions of sub-part E, F, G, or M.

City means the following:

(1) For the purposes of entitlement community development block grant and urban development action grant eligibility:

(i) Any unit of general local government that is classified as a municipality by the United States Bureau of the Census, or

(ii) Any other unit of general local government that is a town or township and that, in determination of the Secretary. . .

24 CFR § 570.600 General.

(a) §104(b) of the Act provides that any grant under §106 of the Act shall be made only if the grantee certifies to the satisfaction of the Secretary, among other things, that the grant "will be conducted and administered in conformity with Pub. L. 88-352 and Pub. L. 90-284," and, further, that the grantee will comply with the other provisions of this Title with other applicable laws.

(c) In addition to grants made pursuant to §106(b) and 106(d)(2)(B) of the Act, sub-parts (d) and (f), respectively, the requirements of this sub-part K are applicable to grants made pursuant to §§107 and 119 of The Act (sub-parts E and G, respectively), . . .

24 CFR § 570.700 Purpose.

This sub-part contains requirements governing the grantee under §108 of The Act of notes or other obligations issued by public entities or by public agencies designated by public entities.

24 CFR § 570.700(b). Public agencies may be designated by eligible units of general local government to receive a loan guarantee on notes or other obligations issued by the public agency in accordance with this sub-part. In such case, the applicant unit of general local government shall be required to pledge its current and future grants under the Act as security for the notes or other obligations issued by the public agency.

24 CFR § 570.701 Definitions.

Designated Public Agency means public agency designated by a public entity to receive a loan guarantee under this sub-part.
Entitlement Public Entity means a metropolitan city or an urban county receiving a grant under sub-part (d) of this part...
Public Entity means any unit of general local government, including units of general local government in a non-entitlement area.

24 CFR § 570.702 Eligible Applicants.

The following public entities may apply for loan guarantee assistance under this sub-part.
(a) Entitlement public entities. . . .

24 CFR § 570.703 Eligible Activities.

(b) Rehabilitation of real property owned or acquired by the public entity or its designated public agency. . . . (Emphasis added)

Revised Code of Washington citations:

RCW 4.16.300. Actions or claims arising from construction, alteration, repair, design, planning, survey,

engineering, etc., of improvements upon real property

RCW 4.16.300 through 4.16.320 shall apply to all claims or causes of action of any kind against any person, arising from such persons having constructed, altered or repaired any improvement upon real property, or having performed or furnished any design, planning, surveying, architectural or construction or engineering services, or supervision or observation of construction, or administration of construction contracts for any construction, alteration or repair of any improvement upon real property. This section is intended to benefit only those persons referenced herein and shall not apply to claims or causes of action against manufacturers.

RCW 4.16.310. Actions or claims arising from construction, alteration, repair, design, planning, survey, engineering, etc., of improvements upon real property -- Accrual and limitations of actions or claims

All claims or causes of action as set forth in RCW 4.16.300 shall accrue, and the applicable statute of limitations shall begin to run only during the period within six years after substantial completion of construction, or during the period within six years after the termination of the services enumerated in RCW 4.16.300, whichever is later. The phrase "substantial completion of construction" shall mean the state of completion reached when an improvement upon real property may be used or occupied for its intended use. Any cause of action which has not accrued within six years after such substantial completion of construction, or within six years after such termination of services, whichever is later, shall be barred: *Provided*, That this limitation shall not be asserted as a defense by any owner, tenant, or other person in possession and control of the improvement at the time such cause of action accrues. The limitations prescribed in this section apply to all claims or causes of action as set forth in RCW 4.16.300 brought in the

name or for the benefit of the state which are made or commenced after June 11, 1986.

RCW 35.82.030 (1965)

" . . . The governing body shall adopt a resolution declaring that there is need for a Housing Authority in the city or county, as the case may be, if it shall find (1) That sanitary or unsafe inhabited dwelling accommodations exist in such city or county or (2) That there is a shortage of safe or sanitary dwelling accommodations in such city or county available to persons of low income at rentals they can afford. In determining whether dwelling accommodations are unsafe or unsanitary said governing body may take into consideration the degree of overcrowding, the percentage of land coverage, the light, area, space and access available to the inhabitants of such dwelling accommodations, the size and arrangement of the rooms, the sanitary facilities and the extent to which conditions exist in such buildings which endanger the life or property by fire or other causes."

RCW 35.83.010 Finding & Declaration of Necessity

"It has been found and declared in the Housing Authority's law that there exist in the state unsafe and unsanitary housing conditions and a shortage of safe and sanitary dwelling accommodations for persons of low income; that these conditions necessitate excessive and disproportionate expenditures of public funds for crime prevention and punishment, public health and safety, fire and accident prevention and other public services and facilities; and that the public interest requires the remedying of these conditions. It is hereby found and declared that the assistance herein provided for the remedying of the conditions set forth in the Housing Authority's law constitutes a public use and purpose and an essential governmental function for which public monies may be spent and other aid given; that it is a proper public purpose for any state public body to aid any Housing Authority operating within its boundaries or jurisdiction or any housing project

located therein, as the state public body derives immediate benefits and advantages from such an Authority or project; and that the provisions hereinafter enacted are necessary in the public interest."

RCW 35.83.030 (1965). Cooperation in undertaking housing projects

For the purpose of aiding and cooperating in the planning, undertaking, construction or operation of housing projects located within the area in which it is authorized to act, any state public body may upon such terms, with or without consideration, as it may determine:

(1) Dedicate, sell, convey or lease any of its interest in any property, or grant easements, licenses or any other rights or privileges therein to a housing authority or the federal government;

(2) Cause parks, playgrounds, recreational, community, educational, water, sewer or drainage facilities, or any other works which it is otherwise empowered to undertake, to be furnished adjacent to or in connection with housing projects;

(3) Furnish, dedicate, close, pave, install, grade, regrade, plan or replan streets, roads, roadways, alleys, sidewalks or other places which it is otherwise empowered to undertake;

(4) Plan or replan, zone or rezone any part of such state public body; make exceptions from building regulations and ordinances; any city or town also may change its map;

(5) Cause services to be furnished to the housing authority of the character which such state public body is otherwise empowered to furnish;

(6) Enter into agreements with respect to the exercise by such state public body of its powers relating to the repair, elimination or closing of unsafe, insanitary or unfit dwellings;

(7) Employ (notwithstanding the provisions of any other law) any funds belonging to or within the control of such state public body, including funds derived from the sale or furnishing of property or facilities to a housing authority, in the purchase

of the bonds or other obligations of a housing authority; and exercise all the rights of any holder of such bonds or other obligations;

(8) Do any and all things necessary or convenient to aid and cooperate in the planning, undertaking, construction or operation of such housing projects;

(9) Incur the entire expense of any public improvements made by such state public body in exercising the powers granted in this chapter;

(10) Enter into agreements (which may extend over any period, notwithstanding any provision or rule of law to the contrary), with a housing authority respecting action to be taken by such state public body pursuant to any of the powers granted by this chapter. Any law or statute to the contrary notwithstanding, any sale, conveyance, lease or agreement provided for in this section may be made by a state public body without appraisal, advertisement or public bidding: *Provided,* There must be five days public notice given either by posting in three public places or publishing in the official county newspaper of the county wherein the property is located; and

(11) With respect to any housing project which a housing authority has acquired or taken over from the federal government and which the housing authority by resolution has found and declared to have been constructed in a manner that will promote the public interest and afford necessary safety, sanitation and other protection, no state public body shall require any changes to be made in the housing project or the manner of its construction or take any other action relating to such construction.

RCW 35.82.070 (1985) Powers of Authority

"(3). . . To include in any contract let in connection with a project, stipulations requiring that the contractor and any subcontractor comply with requirements as to minimum wages and maximum hours of labor and comply with any conditions which the federal government may have attached to its financial aid of the project."

RCW 35.82.120 (1965) Planning, Zoning and Building Laws
"All housing projects of an Authority shall be subject to the planning, zoning, sanitary and building laws, Ordinances and regulations applicable to the locality in which the housing project is situated."

RCW 19.27 Section 3

"Section 3. On and after January 1, 1975, there shall be in effect in all cities, towns and counties of the state a state Building Code which shall consist of the following Codes which are hereby adopted by reference:

(1) Uniform Building Code and related standards, 1973 edition;

(3) Uniform Fire Code with Appendices thereto, 1973 edition."

The relevant portions of the **1973 Uniform Building Code** made applicable to this structure are as follows:

Chapter 33 General

§3301(b) Scope "Every building or portion thereof shall be provided with exits as required by this Chapter . . . ."

§3302(a) Number of Exits "Floors above the second story, basements and cellars used for other than service of the building shall have not less than two exits."

§1310 (a) " . . . Where sleeping rooms are on an upper level, the detector shall be placed at the center of the ceiling directly above the stairway."

Chapter 13 Group "H" Occupancies: Apartment Houses

§1302(b) "Special Provisions. Group "H" Occupancies, more than two stories in height or having more than 3,000 square feet of floor area above the first story, shall be not less than one hour fire resistive construction throughout."

§1304 "Stairs, exits and smoke proof enclosures shall be as specified in Chapter 33.

Every sleeping room below the fourth floor shall have at least one window or exterior door approved for emergency exit or rescue. Where windows are provided they shall have a sill height not more than 48 inches above the floor.

Windows with a net clear openable area of not less than five square feet with dimensions less than 22 inches shall be deemed to meet the requirements of this Section provided the sill heights are not over 48 inches above the floor."

§ 103 "The provisions of this Code shall apply to the construction, alteration, moving, demolition, repair and use of any building or structure within the city . . ."

Application to Existing Buildings. . . "(b) Additions, alterations and repairs: More than fifty percent. When additions, alterations or repairs within any twelve month period exceed fifty percent of the value of an existing building or structure, such building or structure shall be made to conform to the requirements for new buildings or structures.

(c) Additions, alterations and repairs: 25 to 50 percent. Additions, alterations and repairs exceeding 25 but not exceeding fifty percent of the value of an existing building or structure in complying with the requirements for new buildings or structures may be made to such building or structure within any twelve month period without making the entire building or structure comply. The new construction shall conform to the requirements of this Code for a new building of like area, height and occupancy. Such building or structure, including new additions, shall not exceed the areas and heights specified in this Code.

(d) Additions, alterations and repairs: 25 percent or less. Structural additions, alterations and repairs . . . shall comply with all the requirements for new buildings . . .

(e) Nonstructural alterations and repairs: 25 percent or less. . . . May be made with same materials . . ."

§301(a) Permits Required. "No person, firm or corporation shall erect, construct, enlarge, alter, repair, move, improve, remove, convert or demolish any building or structure in the city or cause the same to be done without first obtaining a separate building permit for each such building or structure from the building official.

(b) Application: Plan specifications, valuation of the proposed work, etc." . . .

§408 "Grade (Adjacent Ground Elevation) is the lowest point of elevation of the finished surface of the ground, paving or sidewalk within the area between the building and the property line or when the property line is more than five feet from the building between the building and a line five feet from the building."

§409 "Height of building is the vertical distance above 'grade'."

§420 Stairway Two or more risers shall constitute a stairway."

"Story is that portion of the building included between the upper surface of any floor and the upper surface of the floor next above, except that the topmost story shall be that portion of a building included between the upper surface of the topmost floor and the ceiling or roof above. If the finished floor level directly above a basement, cellar or unused under-floor space is more than six feet above grade as defined herein for more than fifty percent of the total perimeter or is more than twelve feet above grade as defined herein at any point, such basement, cellar or unused under-floor space shall be considered as a story."

Appendix Chapter 13 Existing Buildings

§1313(a) Purpose "The purpose of this Section is to provide a reasonable degree of safety to persons living and sleeping in apartment houses and hotels through providing for alteration to existing buildings as do not conform with the minimum safety requirements of this Code.

(b) Scope The provisions of this Section shall apply exclusively to existing nonconforming group H occupancies more than two stories in height. . . .

(d) Number of Exits Every apartment and every other sleeping room shall have access to not less than two exits. A fire escape as specified herein may be used as one required exit.

(h) Fire Escapes Fire escapes may be used as one means of egress, if the pitch does not exceed sixty degrees, the width is not less than eighteen inches, the treads are not less than four inches wide and they extend to the ground or are provided with counter-balance stairs reaching to the ground. Access shall be by an opening having a minimum dimension of 29 inches when

open. The sill shall be not more than thirty inches above the floor and landing."

1967 Uniform Building Code:

§ 3302(a) ". . . Floors above the second story, basements and cellars used for other than service of the building shall have not less than two exits."

§ 420 ". . . If the finished floor level directly above a basement, cellar or unused under-floor space is more than six feet above grade as defined herein for more than fifty percent of the total perimeter or more than twelve feet above grade as defined herein at any point, such basement, cellar or unused under-floor space shall be considered as a story."

Department of Housing & Urban Development Minimum Property Standards:

M505-2 Number of Exits. Every living unit shall have access to at least two separate exits which are remote from each other and are reachable by travel in different directions, except that a common path of travel is permitted under certain conditions, see M409 and M505-3.

405-6.2 Number of Exits. (1973) (a) Every living unit shall have access to at least two separate exits which are remote from each other and are reachable by travel in different directions, except that a common path of travel is permitted under certain conditions, see 402-4.5 and 405-6.3.

Department of Housing & Urban Development Minimum Property Standards (Revised Feb. '78, USDHUD 4940.4:

2-1 Local Codes and Regulations

b) Where a local code, regulation or requirement is incomplete or does not fulfill the purpose and intent of this

handbook, this document or local standards derived from this handbook shall apply.

5-1 . . . An additional objective of this section is to provide means of egress which will permit persons to leave the building with safety in an emergency, and permit access for fire control personnel.

City of Tacoma Ordinances:

City of Tacoma Ordinance 19587:
Section 3.02.190 Exits Required. Every apartment and other living unit shall have access to at least two (2) exits as defined by National Fire Codes, 1971-72 edition, with the following exceptions:

(1). An existing fire escape, as specified herein, may be allowed as one (1) required exit.

(2). In apartment buildings with three (3) or less communicating floor levels and an occupant load of ten (10) or less, a single common exit may be allowed, provided that each living unit has an operable window at the exterior wall of the building, which provides immediate escape or rescue potential in the opinion of the fire marshall. Window openings shall be a minimum of five (5) square feet in area, with no opening dimension less than twenty-two (22) inches. Window sills shall be no higher than forty-eight (48) inches from floor level."

City of Tacoma Ordinance 23218 adopted 7/17/84:
3.05.040 Exits Required. Every dwelling unit or guest room shall have access to at least two (2) exits as defined by the Uniform Fire Code as adopted by Chapter 3.02 of the Official Code of the City of Tacoma.
Exceptions:

(1) An existing fire escape, as specified herein, may be allowed as one (1) required exit. . . .

(2) The buildings housing Group R , Division I occupancies, with three [3] or less communicating floor levels and single common areas which serve an occupant load of ten

(10) or less, the second exit may be provided from each dwelling unit or guest room from a window located in each sleeping room which will serve as a means of emergency exit and rescue. Such windows shall open to provide a minimum clear opening of 5.7 square feet, with a minimum clear width of twenty (20) inches and a minimum clear height of twenty-four (24) inches. The sill height for such windows shall not exceed forty-four (44) inches. Existing windows which provide a minimum clear opening of five (5) square feet, a minimum clear dimension of twenty-two (22) inches in both height and width, with a maximum sill height of forty-eight (48) inches in buildings built prior to May 26, 1981, will be accepted for the purposes of emergency exit and rescue."

City of Tacoma Ordinance 23219

AN ORDINANCE to be known as the Fire Code, regulating hazards to life and property from fire and explosion arising from storage, handling and use of hazardous substances, materials and devices, and from conditions hazardous to life and property in the use or occupancy of buildings or premises-in the City of Tacoma; providing for the issuance of permits; providing penalties for violation, adopting by reference the 1 982 Edition of the Uniform Fire Code and the Uniform Fire Code Standards; and amending the Official Code of the City of Tacoma by repealing and reenacting Sections 3.02.010 through 3.02.090 thereof and by repealing Sections 3.02.1 00 through 3.02.1 50 thereof.

BE IT ORDAINED BY THE CITY OF TACOMA:

Section 1. That Sections 3.02.010 through 3.02.090 of the Official Code of the City of Tacoma be and they are hereby repealed and reenacted to read as follows:

3.02.010 ADOPTION OF THE UNIFORM FIRE CODE. The 1 982 Edition of the Uniform Fire Code, and Uniform Fire Code Standards, together with Appendices I-B, 11-A, 11-B, 11-D, III-A, III-C, V-A, and VI-A, published jointly by the International Conference of Building Officials and

the Western Fire Chiefs Association, are hereby adopted by this reference pursuant to the provisions of Section 35.21.1 80, Revised Code of Washington, as the official Fire Code of the City of Tacoma, such adoption by reference, however, to be subject to the amendments to the adopted Uniform Fire Code as those amendments are hereinafter set forth.

3.02.020 GENERAL AMENDMENTS. The following numbered sections and numbered tables @f the Uniform Fire Code, as adopted by reference in this chapter, are amended to read as hereinafter set forth; and as so amended shall supersede that section or table so numbered in the Uniform Fire Code and shall be part of the official Fire Code of the City of Tacoma. The sections and tables amended are as follows:
2.302; 3.101; 9.107; 9.117; 10.302(c); 10.309(b)4

3.02.030 AMENDMENT OF SECTION 2.302, BOARD OF APPEALS.

Section 2.302. The Board of Building Appeals, as created by Chapter 2.17 of the Official Code of the City of Tacoma, is the properly designated Board of Appeals for the Fire Code. The Board of Building Appeals, within the authority granted it by Chapter 2.1 7 of the Official Code of the City of Tacoma, shall:

A. Hear appeals properly filed in accordance with Chapter 2.1 7 of the Official Code of the City of Tacoma of interpretations made by the Chief.

B. On a properly filed request in accordance with Chapter 2.17 of the Official Code of the City of Tacoma, determine the suitability of alternate materials and/or methods of construction to those specified in the Fire Code.

3.02.040 AMENDMENT OF SECTION 3.101 - UNLAWFUL CONTINUANCE OF FIRE HAZARD AND PENALTIES.

Section 3.101. Any person, firm, or corporation operating or maintaining any occupancy, premises, or vehicle subject to this code which shall permit any fire hazard to exist on premises under its control or who shall fail to take

immediate action to abate a fire hazard when ordered or notified to do so by the Chief or his duly authorized representative shall be guilty of a misdemeanor, and each such person, firm, or corporation shall be guilty of a separate offense for each and every day or portion thereof during which any violation of any of the provisions of this code is committed, continued or permitted, and upon conviction of any such violation such person, firm or corporation shall be punishable by a fine of not more then $500 or by imprisonment for not more than 1 80 days, or by both such fine and imprisonment.

3.02.050 AMENDMENT OF SECTION 9.107, DEFINITIONS.

Section 9.107. ELECTRICAL CODE is the National Electrical Code promulgated by the National Fire Protection Association, as adopted by the City of Tacoma.

ELECTRIC BLASTING CAP is a shell containing a charge of detonating compound designed to be fired by an electric current.

ELECTROSTATIC FLUIDIZED BED is a container holding powder coating material which is aerated from below so as to form an air-supported expanded cloud of such material which is electrically charged with a charge opposite to the charge of the object to be coated. Such object is transported through the container immediately above the charged and aerated materials in order to be coated.

EXECUTIVE BODY is the Tacoma City Council.

EXISTING BUILDING is a building for which the building permit was issued prior to adoption of this code.

EXIT is a continuous and unobstructed means of egress to a public way, and shall include aisles, intervening doors, doorways, corridors, exterior exit balconies, ramps, stairways, smokeproof enclosures, horizontal exits, exit passageways, exit courts, and yards.

EXIT COURT is a yard or court providing egress to a public way for one or more required exits.

EXIT PASSAGEWAY is an enclosed means of egress connecting a required exit or exit court with a public way.

EXPLOSIVE is any chemical compound or mechanical mixture which is commonly used or intended for the purpose of producing an explosion, which contains any oxidizing and combustible units or other ingredients in such proportions, quantities, or packing, that an ignition by fire, by friction, by concussion, by percussion, or by detonator of any part of the compound or mixture may cause such a sudden generation of highly heated gases that the resultant gaseous pressures are capable of producing destructive effects on contiguous objects or of destroying life and limb.

3.02.060 AMENDMENT OF SECTION 9.117 - DEFINITIONS.

Section 9.117. OCCUPANCY is the purpose for which a building or part thereof is used or intended to be used.

Group A Occupancies:

Division 1. Any assembly building with a stage and an occupant load of 1 000 or more in the building.

Division 1.1. Any building or portion of a building having an assembly room with an occupant load in excess of 10,000 without a stage.

Division 2. Any building or portion of a building having an assembly room with an occupant load of less than 1000 and a stage.

Division 2.1. Any building or portion of a building having an assembly room with an occupant load of 300 but less than 10,000 without a stage, including such buildings used for educational purposes and not classed as a Group E or Group B, Division 2 Occupancy.

Division 3. Any building or portion of a building having an assembly room with an occupant load of less than 300 without a stage, including such buildings used for educational purposes and not classed as a Group E or Group B, Division 2 Occupancy.

Division 4. Stadiums, reviewing stands, and amusement park structures not included within other Group A Occupancies.

Group B Occupancies:

Division 1. Gasoline service stations, garages where no

repair work is done except exchange of parts and maintenance requiring no open flame, welding or the use of flammable liquids.

Division 2. Drinking and dining. establishments having an occupant load of less than 50, wholesale and retail stores, office buildings, printing plants, municipal police and fire stations, factories, and workshops using materials not highly flammable or combustible, storage and sales rooms for combustible goods, paint stores without bulk handling.

Buildings or portions of buildings having rooms used for educational purposes beyond the 12th grade with less than 50 occupants in any room.

Division 3. Aircraft hangars where no repair work is done except exchange of parts and maintenance requiring no open flames, welding or the use of highly flammable liquids. Open parking garages. Heliports.

Division 4. Ice plants, power plants, pumping plants, cold storage creameries.

Factories and workshops using noncombustible and nonexplosive materials.

Storage and sales rooms of noncombustible and nonexplosive materials.

Group E Occupancies:

Division 1. Any building used for educational purposes through the 12th grade with an occupant load of 50 or more for more than 12 hours per week or four hours in any one day.

Division 2. Any building used for educational purposes through the 12th grade with occupant load of less than 50 for more than 12 hours per week or four hours in any one day.

Division 3. Any building used for day care purposes for more than six children.

Group H Occupancies:

Division 1 - Storage, handling, use, or sale of hazardous and highly flammable or explosive materials other than flammable liquids.

EXCEPTION: The storage, handling, use, or sale of hazardous materials or chemicals which do not exceed the quantities listed

in Table No. 9-A of the Building Code is permitted in other occupancies, provided the storage, handling, use or sale of such hazardous materials or chemicals is in compliance with this code.

Division 2. Storage, handling, use, or sale of Class 1, Class 11 and Class 111-A liquids, dry-cleaning plants using Class 1, 11 or Iii-A liquids; paint stores with bulk handling; paint shops and spray-painting rooms and shops.

EXCEPTION: The storage, handling, use, or sale of liquids in quantities which do not exceed those set forth in Table No. 9-A of the Building Code is permitted in other occupancies, provided the storage, handling, use, or sale is in compliance with the provisions of this code.

Division 3. Woodworking establishments, planing mills, box factories, buffing rooms for tire rebuilding plants, and picking rooms, shops, factories or warehouses where loose combustible fibers or dust are manufactured, processed, generated or stored, and pin refinishing rooms.

Division 4. Repair garages not classified as a Group B, Division I Occupancy.

Division 5. Aircraft repair hangars.

Group I Occupancies:

Division 1. Nurseries for the full-time care of children under the age of six (each accommodating more than five persons).

Hospitals, sanitariums, nursing homes with nonambulatory patients, and similar buildings (each accommodating more than five persons).

Division 2. Nursing homes for ambulatory patients, homes for children six years of age or over (each accommodating more than five persons).

Division 3. Mental hospitals, mental sanitariums, jails, prisons, reformatories, and buildings where personal liberties of inmates are similarly restrained.

Division 4. Group homes for the developmentally disabled and physically handicapped (each accommodating more than five persons).

Group M Occupancies:

Division 1. Private garages, sheds, and agricultural buildings when not over 1000 square feet in area.

Division 2. Fences, tanks, and towers.

Group R Occupancies:

Division 1. Hotels and apartments. Convents and monasteries (each accommodating more than 1 0 persons).

Division 2. Not used.

Division 3. Dwellings and lodging houses.

OIL-BURNING EQUIPMENT is an oil burner of any type together with its tank, piping, wiring, controls, and related devices, and shall include all oil burners, oil-fired units, and heating and cooking appliances, but exclude those exempted by Section 61.101.

OIL-FIRED UNIT is a heating appliance equipped with one or more oil burners and all the necessary safety controls, electrical equipment, and related equipment manufactured for assembly as a complete unit. This definition does not include kerosene stoves or oil stoves.

OPEN-AIR GRANDSTANDS and BLEACHERS are seating facilities which are located so that the side toward which the audience faces is unroofed and without an enclosing wall.

OPERATING LINE is a group of separated operating buildings of specific arrangement used in the assembly, modification, reconditioning, renovation, maintenance, inspection, surveillance, testing, or manufacturing of explosives.

ORGANIC COATING is a liquid mixture of binders such as alkyd, nitrocellulose, acrylic, or oil and flammable and combustible solvents such as hydrocarbon, ester, ketone, or alcohol, which when spread in a thin film converts to a durable protective and decorative finish.

OWNER includes his/her duly authorized agent or attorney, a purchaser, devisee, fiduciary, and a person having vested or contingent interest in the property in question.

OXIDIZING MATERIALS are substances that readily yield oxygen to stimulate combustion.

3.02.070 AMENDMENT OF SECTION 10.302 BY

ADDITION OF A SUBSECTION (c) - MAINTENANCE.

Section 10.302(c) Maintenance of Fire Pumps.

1. Any fire pump required by this code shall be annually serviced and tested to assure proper operation in times of emergency. All pumps shall be tested at maximum capacity to make sure neither pump or suction pipe is obstructed.

2. All pumps shall be operated quarterly, at rated speed, with water discharging at some convenient opening, to assure continued lubrication of bearings, stuffing boxes, or other aspects of the pump assembly, for at least a 1 0-minute period.

3. Pumps located in a salt water climate or atmosphere conducive to corrosion of parts shall be operated weekly at rated speed, with water flowing for at least a 1 minute period.

4. A written log shall be kept at the nearest practical location, with dates of operation noted, and specifying repairs done to the system. The log shall be retained for a time sufficient to show maintenance records for one current year, and shall be available for inspection by Fire officials at reasonable hours of the day.

3.02.080 AMENDMENT OF SECTION 10.309(b)4 - AUTOMATIC SPRINKLER SYSTEMS WHERE REQUIRED.

Section 10.309(g)4. Group I Occupancies. An automatic sprinkler system shall be installed in Group I Occupancies.

EXCEPTIONS:

1 . In hospitals of Type 1, II Fire-Resistive and II One-Hour Construction, the automatic sprinkler system may be provided in operating, delivery, cardiac, x-ray, recovery, and intensive care rooms with a manual control valve, which is normally in the off position, located just outside the entrance to these rooms, and provided these rooms are provided with smoke detectors connected to a continuously attended station or locations within the building. Increase for area and height specified in Sections 506(c) and 507 of the Uniform Building Code as adopted by Chapter 2.02 of the Official Code of the City of Tacoma shall not apply when this exception is used.

2. In jails, prisons, and reformatories, the piping system may be dry, provided a manually operated valve is installed in a continuously monitored location. Opening of the valve will cause the piping system to be charged.

Sprinkler heads in such systems shall be equipped with fusible elements, or the system shall be designed as required for deluge systems in U.B.C. Standard No. 38-1. 3. Group 1, Division 4 Occupancies with an occupant load of 20 or less residents, excluding supervisory personnel.

3.02.090 CONFLICTS WITH OTHER CODES.

In case of conflict among the codes enumerated below, the first named code shall govern over those following:

1. The Uniform Building Code as set forth in Chapter 2.02 of the Official Code of the City of Tacoma.

2. The Uniform Mechanical Code as set forth in Chapter 2.07 of the Official Code of the City of Tacoma.

3. The Uniform Fire Code as set forth in Chapter 3.02 of the Official Code of the City of Tacoma.

4. The Uniform Plumbing Code as set forth in Chapter 2.06 of the Official Code of the City of Tacoma.

Section 2. That Sections 3.02.1 00 through 3.02.1 50 of the Official Code of the City of Tacoma, Washington, be and they are hereby repealed in their entirety.

Passed July 17, 1984

/s/ Mayor

Attest: City Clerk

City of Tacoma Resolution 20733, 2/21/70:

RESOLUTION NO. 20733

REQUESTED BY CITY MANAGER

WHEREAS, it is the policy of this locality to eliminate substandard and other inadequate housing and to prevent the spread of slums and blight, and to revitalize as soon as feasible the goal of a decent home in a suitable living environment for all of its citizens, and

WHEREAS, the Housing Authority of the City of Tacoma shall endeavor to secure a contract or contracts with the

United States of America, acting through the Secretary of Housing and Urban Development, for loans and annual contributions covering one or more projects comprising approximately 200 units of low-rent housing, and

WHEREAS, the City of Tacoma is desirous of cooperating with the Housing Authority of the City of Tacoma, pursuant to the provisions of Sections 35.83.055 through 35.83.070 of the Revised Code of Washington, known as the Housing Cooperation Law, by entering into a Cooperation Agreement with the Housing Authority of the City of Tacoma providing for local cooperation in connection with such low-rent housing project or projects serving the needs of low-income persons, and

WHEREAS, due and proper notice of consideration of said matter has been given as provided for in RCW 35.83.030(10); Now Therefore,

BE IT RESOLVED BY THE COUNCIL OF THE CITY OF TACOMA:

That in the interest of providing needed low-rent housing within the means of low-income persons and families, the proper officials of the City of Tacoma are hereby authorized and directed to execute a Cooperation Agreement on behalf of the City of Tacoma with the Housing Authority of the City of Tacoma, substantially in the form attached hereto, marked Exhibit "A", and by this reference incorporated herein, and such officers are hereby authorized and directed to execute such other documents and perform any other acts necessary in furtherance of said cooperation agreement.

Adopted 7-21-70

GORDON N. JOHNSTON, Mayor

Attest JOSEPHINE MELTON, City Clerk

JHC:jec

City of Tacoma Resolution 11050

By CAIN:

A RESOLUTION DECLARING THE NEED OF A HOUSING AUTHORITY IN THE CITY OF TACOMA, WASHINGTON, & RESCINDING

RESOLUTION NO. 11049

BE IT RESOLVED BY THE COUNCIL OF THE CITY OF TACOMA:

That the Council of the City of Tacoma, Washington, hereby determines, finds and declares, in pursuance of the "Housing Authorities Law" of the State of Washington, that:

1. Insanitary and unsafe inhabited dwelling accommodations exist in the City of Tacoma, Washington; and

2. There is a shortage of safe and sanitary dwelling accommodations in the City of Tacoma, Washington, available to persons of low income at rentals they can afford; and

3. There is a need for a Housing Authority in the City of Tacoma, Washington; and

4. The Mayor of the City of Tacoma be and he is hereby authorized to appoint five suitable persons as commissioners of said Housing Authority hereby authorized to be established.

5. The Mayor of the City of Tacoma, Washington, be promptly notified of this resolution; and

6. Resolution No. 11049 of the City of Tacoma, adopted August 14, 1940, be and the same is hereby rescinded.

It was moved by Mr. Cain to adopt the resolution. Motion was seconded by Mr. Bergerson and carried upon roll call: Ayes 4; Bergerson, Eastwood, Fawcett, Mr. President. Nays 0. Absent 1; O'Neil.

Thereupon the president declared such resolution duly accepted and passed.

The Mayor of the City of Tacoma, being present at the meeting, was thereupon notified of the adoption of said resolution.

Upon motion, duly seconded and carried, the special meeting adjourned.

HARRY P. CAIN (Signed)
President of City Council

Attest: Genevieve Martin (Signed)
City Clerk

CERTIFICATE OF RECORDING OFFICER

I, GENEVIEVE MARTIN, Clerk of the City of

Tacoma, Washington, hereby certify that I have compared the annexed extract of the minutes of a Special Meeting of the Council of said City, held on the 16th day of August, 1940, containing a resolution entitled: "A Resolution Declaring the Need for a Housing Authority in the City of Tacoma, Washington", with the original thereof recorded in the official minute book and that it is a correct transcript therefrom and of the whole of said original; that the foregoing extract of the minutes of the meeting at which said resolution was adopted is a true and complete transcript of such minutes and that the foregoing resolution is a true, complete and accurate copy of the resolution adopted at said meeting.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the City of Tacoma, Washington, this 23rd day of August, 1940.

GENEVIEVE MARTIN (Signed)
City Clerk

SEAL

Certificate of Appointment of Commissioners

CERTIFICATE OF APPOINTMENT OF COMMISSIONERS OF THE HOUSING AUTHORITY OF THE CITY OF TACOMA, WASHINGTON, AND DESIGNATION OF THE FIRST CHAIRMAN

WHEREAS, the Council of the City of Tacoma, Washington, held a duly authorized and called special meeting on the 16th day of August, 1940; and

WHEREAS, at said meeting the following resolution was adopted and passed:

"A RESOLUTION DECLARING THE NEED OF A HOUSING AUTHORITY IN THE CITY OF TACOMA, WASHINGTON, AND RESCINDING RESOLUTION NO. 10049

BE IT RESOLVED BY THE COUNCIL OF THE CITY OF TACOMA:

That the Council of the City of Tacoma, Washington, hereby determines, finds and declares, in pursuance of the "Housing Authorities Law" of the State of Washington, that:

1. Insanitary and unsafe inhabited dwelling accommodations exist in the City of Tacoma, Washington; and

2. There is a shortage of safe and sanitary dwelling accommodations in the City of Tacoma, Washington, available to persons of low income at rentals they can afford; and

3. There is a need for a Housing Authority in the City of Tacoma, Washington; and

4. The Mayor of the City of Tacoma be and he is hereby authorized to appoint five suitable persons as commissioners of said Housing Authority hereby authorized to be established.

5. The Mayor of the City of Tacoma, Washington, be promptly notified of the adoption of this resolution; and

6. Resolution No. 11049 of the City of Tacoma, adopted August 14, 1940, be and the same is hereby rescinded."

NOW, THEREFORE, pursuant to the provisions of Section 5 of the "Housing Authorities Law" of the State of Washington, approved on the 24th day of February, 1939, and by virtue of my office as Mayor, I hereby appoint the five (5) persons hereinafter named to serve as Commissioners of the Housing Authority of the City of Tacoma, Washington, and to serve for the number of years appearing after their names, respectively, from the 17th day of August, 1940:

Harry W. Andrews	One Year
Fred Shoemaker	Two Years
Wallace Morrissette	Three Years
Glenn A. Reeves	Four Years
M. Stanley Erdahl	Five Years

I hereby designate Harry W. Andrews as the first Chairman of the Housing Authority of the City of Tacoma, Washington.

IN WITNESS WHEREOF, I have hereunto signed my name as Mayor of the City of Tacoma, Washington, and caused the official corporate seal of said City of Tacoma to be attached hereto this 17th day of August, 1940.

HARRY P. CAIN (Signed), Mayor.

Attest: Genevieve Martin (Signed), City Clerk

SEAL

CERTIFICATE OF MAYOR

I, HARRY P. CAIN, Mayor of the City of Tacoma, Washington, hereby certify that the foregoing certificate was duly filed in the office of the Clerk of the City of Tacoma, Washington, on the 17th day of August, 1940.

HARRY P. CAIN (Signed)
Mayor.

Date: August 17, 1940

I HEREBY CERTIFY that on the 17th day of August, 1940, a Certificate of Appointment of Commissioners of the Housing Authority of the City of Tacoma, Washington, was filed with the undersigned, said Certificate being dated August 17, 1940, and signed by the Mayor of the City of Tacoma, Washington, and that the foregoing is a true, correct and compared copy of the original Certificate of Appointment which is now on file in the office of the City Clerk of the City of Tacoma, Washington.

I further certify that none of the Commissioners referred to in the Certificate of Appointment of the Commissioners of the Housing Authority of the City of Tacoma is an officer or employee of said City.

WITNESS my hand and the official seal of the City of Tacoma, Washington, this 23rd day of August, 1940.

GENEVIEVE MARTIN (Signed)
City Clerk

SEAL

Audit Report, Office of the Inspector General, Region X, Seattle, Washington: Report to the Regional Administrator - Regional Housing Commissioner on the Section 108 Loan Guarantee Assistance Program, Tacoma, Washington, 90-SE-249-1008, July 13, 1990

[audit report symbol]

OFFICE OF THE INSPECTOR GENERAL

REPORT TO THE REGIONAL ADMINISTRATOR-
REGIONAL HOUSING COMMISSIONER
ON
THE SECTION 108 LOAN
GUARANTEE ASSISTANCE PROGRAM
TACOMA, WASHINGTON
90-SE-249-1008
JULY 13, 1990

[HUD seal symbol]

OFFICE OF AUDIT, REGION X
SEATTLE, WASHINGTON

INTRODUCTION

THE SECTION 108 PROGRAM ALLOWS LOANS FOR LARGER PROJECTS THAN COULD BE ACCOMPLISHED WITH A GRANTEE'S ANNUAL CDBG ENTITLEMENT FUNDS

Title I of the Housing and Community Development Act of 1974 (the Act), P.L. 93-383 enacted August 22, 1974, established the Community Development Block Grant (CDBG) program. The CDBG program provides grants to states and units of general local government to aid in the development of viable urban communities by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income.

Section 108 of the Act permits cities to obtain loan guarantee assistance up to three times their annual CDBG entitlement grant. Section 108 loans are made by the Federal Financing Bank (an agency of the U.S. Treasury), guaranteed by the U.S. Government, secured by the City's current and future CDBG entitlement grants, and generally payable in six years. HUD requires cities to use Section 108 funds for projects that meet one of the broad national objectives of the CDBG program.

The City of Tacoma (City), through the Community Development Department, is responsible for administering the Section 108 loan guarantee program. In January 1982, the City entered into an agreement with the Municipal Authority, a subgrantee, to administer certain aspects of the program. The Director of the Community Development Department and the Municipal Authority Board of Directors underwrite and approve Section 108 loans.

24 CFR 570.700 states that designation of a public agency (e.g. The Municipal Authority) to administer Section 108 activities does not relieve the City of its responsibilities in assuring the administration of the program in accordance with all HUD requirements.

COOPERATION AGREEMENT

This Agreement, entered into this 18th day of August, 1970, by and between the Housing Authority of the City of Tacoma (herein called the "Local Authority") and the City of Tacoma (herein called the "Municipality"), witnesseth:

In consideration of the mutual covenants hereinafter set forth, the parties hereto do agree as follows:

1. Whenever used in this Agreement:
   a. The term "Project" shall mean any low-rent housing hereafter developed as an entity by the Local Authority with financial assistance of the United States of America acting through the Secretary of Housing and Urban Development

(herein called the "Government"); excluding, however, any low-rent housing project covered by any contract for loans and annual contributions entered into between the Local Authority and the Government, or its predecessor agencies, prior to the date of this Agreement.

b. The term "Taxing Body" shall mean the State or any political subdivision or taxing unit thereof in which a Project is situated and which would have authority to assess or levy real or personal property taxes or to certify such taxes to a taxing body or public officer to be levied for its use and benefit with respect to a Project if it were not exempt from taxation.

c. The term "Shelter Rent" shall mean the total of all charges to all tenants of a Project for dwelling rents and nondwelling rents (excluding all other income of such Project), less the cost to the Local Authority of all dwelling and nondwelling utilities.

d. The term "Slum" shall mean any area where dwellings predominate which, by reason of dilapidation, overcrowding, faulty arrangement or design, lack of ventilation, light or sanitation facilities, or any combination of these factors, are detrimental to safety, health, or morals.

2. The Local Authority shall endeavor (a) to secure a contract or contracts with the Government for loans and annual contributions covering one or more Projects comprising approximately 200 units of low-rent housing and (b) to develop and administer such Project or Projects, each of which shall be located within the corporate limits of the Municipality. The obligations of the parties hereto shall apply to each such project.

3. a. Under the constitution and statutes of the State of Washington, all Projects are exempt from all

real and personal property taxes and special assessments levied or imposed by any Taxing Body. With respect to any Project, so long as either (i) such Project is owned by a public body or governmental agency and is used for low-rent housing purposes, or (ii) any contract between the Local Authority and the Government for loans or annual contributions, or both, in connection with such Project remains in force and effect, or (iii) any bonds issued in connection with such Project remain unpaid, whichever period is the longest, the Municipality agrees that it will not levy or impose any real or personal property taxes or special assessments upon such Project or upon the Local Authority with respect thereto. During such period, the Local Authority shall make annual payments (herein called "Payments in Lieu of Taxes") in lieu of such taxes and special assessments and in payment for the public services and facilities furnished from time to time without other cost or charge for or with respect to such Project.

b. Each such annual Payment in Lieu of Taxes shall be made at the time when real property taxes on such Project would be paid if it were subject to taxation, and shall be in an amount equal to either (i) ten percent (10%) of the Shelter Rent actually collected but in no event to exceed ten percent (10%) of the Shelter Rent charged by the Local Authority in respect to such Project during the 12 month period ending December 31 of the year such payment is made, or (ii) the amount permitted to be paid by applicable State law in effect on the date such payment is made, whichever amount is the lower.

4. The Municipality agrees that, subsequent to the date of initiation (as defined in the United States Housing Act of 1937, as amended) of each Project and within five years after the completion thereof, or such further period as may be approved by the Government, there has been or will be elimination, as certified by the Municipality, by demolition, condemnation, effective closing or compulsory repair or improvement, of unsafe or insanitary dwelling units situated in the locality or metropolitan area in which such Project is located, substantially equal in number to the number of newly constructed dwelling units provided by such Project; Provided, That, where more than one family is living in an unsafe or insanitary dwelling unit, the elimination of such unit shall count as the elimination of units equal to the number of families accommodated therein; and Provided, further, That this paragraph 4 shall not apply in the case of (i) any Project developed on the site of a Slum cleared subsequent to July 15, 1949, and that the dwelling units eliminated by the clearance of the site of such Project shall not be counted as elimination for any other Project or any other low-rent housing Project, or (ii) any Project located in a rural nonfarm or Indian area.
5. During the period commencing with the date of the acquisition of any part of the site or sites of any Project and continuing as long as either (i) such Project is owned by a public body or governmental agency and is used for low-rent housing purposes, or (ii) any contract between the Local Authority and the Government for loans or annual contributions, or both, in connection with such Project remains in force and effect, or (iii) any bonds issued in connection with such Project or any monies due to the Government in connection with such Project remain unpaid, whichever period is the longest, the Municipality without cost or charge to the Local Authority or the tenants of such Project (other than the

Payments in Lieu of Taxes) shall, pursuant to the statutes of the State of Washington:

a. Furnish or cause to be furnished to the Local Authority and the tenants of such Project public services and facilities of the same character and to the same extent as are furnished from time to time without cost or charge to other dwellings and inhabitants in the Municipality;

b. Vacate such streets, roads and alleys within the area of such Project as may be necessary in the development thereof, and convey without charge to the Local Authority such interest as the Municipality may have in such vacated areas; and, in so far as it is lawfully able to do so without cost or expense to the Local Authority or to the Municipality cause to be removed from such vacated areas, in so far as it may be necessary, all public or private utility lines and equipment;

c. In so far as the Municipality may lawfully do so, (i) grant such deviations from the building code of the Municipality as are reasonable and necessary to promote economy and efficiency in the development and administration of such Project, and at the same time safeguard health and safety, and (ii) make such changes in any zoning of the site and surrounding territory of such Project as are reasonable and necessary for the development and protection of such Project and the surrounding territory.

d. Accept grants of easements necessary for the development of such Project; and

e. Cooperate with the Local Authority by such other lawful action or ways as the Municipality and the Local Authority may find necessary in connection with the development and administration of such Project.

6. In respect to any Project the Municipality further agrees that within a reasonable time after receipt of a written request therefor, from the Local Authority, and pursuant to the laws of the State of Washington,
   a. It will accept the dedication of all interior streets, roads, alleys, and adjacent sidewalks within the area of such Project, together with all storm and sanitary sewer mains in such dedicated areas, after the Local Authority, at its own expense, has completed the grading, improvement, paving and installation thereof in accordance with specifications acceptable to the Municipality;
   b. It will accept necessary dedications of land for, and will grade, improve, pave and provide sidewalks for all streets bounding such Project or necessary to provide adequate access thereto (in consideration whereof, the Local Authority shall pay to the Municipality such amount as would be assessed against the Project site for such work if such site were privately owned); and
   c. It will provide, or cause to be provided, water mains, and storm and sanitary sewer mains, leading to such Project and serving the bounding streets thereof (in consideration whereof the Local Authority shall pay to the Municipality such amount as would be assessed against the Project site for such work if such site were privately owned).
7. If by reason of the Municipality's failure or refusal to furnish or cause to be furnished any public services or facilities which it has agreed hereunder to furnish or cause to be furnished to the Local Authority or to the tenants of any Project, the Local Authority incurs any expense to obtain such services or facilities, then the Local Authority may deduct the amount of such expense

from any Payments in Lieu of Taxes due or to become due to the Municipality in respect to any Project or any other low-rent housing Projects owned or operated by the Local Authority.

8. No Cooperation Agreement heretofore entered into between the Municipality and the Local Authority shall be construed to apply to any Project covered by this Agreement.
9. No member of the governing body of the Municipality or any other public official of the Municipality who exercises any responsibilities or functions with respect to any Project during his tenure or for year thereafter shall have any interest, direct or indirect, in any Project or any property included or planned to be included in any Project, or any contracts in connection with such Projects or property. If any such governing body member or such other public official of the Municipality involuntarily acquires or had acquired prior to the beginning of his tenure any such interest, he shall immediately disclose such interest to the Local Authority.
10. So long as any contract between the Local Authority and the Government for loans (including preliminary loans) or annual contributions, or both, in connection with any Project remains in force and effect, or so long as any bonds issued in connection with any Project or any monies due to the Government in connection with any Project remain unpaid, this Agreement shall not be abrogated, changed, or modified without the consent of the Government. The privileges and obligations of the Municipality hereunder shall remain in full force and effect with respect to each so long as the beneficial title to such Project is held by the Local Authority or by any other public body or governmental agency, including the Government, authorized by law to engage in the development or administration of low-rent housing projects. If at any time the beneficial title to, or

possession of, any Project is held by such other public body or governmental agency, including the Government, the provisions hereof shall inure to the benefit of and may be enforced by, such other public body or governmental agency, including the Government.

IN WITNESS WHEREOF the Municipality and the Local Authority have respectively signed this Agreement and caused their seals to be affixed and attested as of the day and year first above written.

Countersigned:
/s/
Director of Finance

CITY OF TACOMA
By /s/ Gordon Johnson, Mayor

Attest:
/s/ Josephine Melton
City Clerk

Approved:
/s/
Chief Assistant City Attorney

(SEAL)

Housing Authority of the City of Tacoma
(Corporate Name of Local Authority)
By /s/
Chairman

Attest:
/s/ Harold Bergeson
Executive Director
(Title)

DEED FOR WASHINGTON

THIS INDENTURE, Made this 1st day of November 1976, between Carla A. Hills, Secretary of Housing and Urban Development of Washington, D. C., (hereinafter referred to as "Grantor") and The Housing Authority of the City of Tacoma, Washington (hereinafter referred to as "Grantee"), and the heirs and assigns of the said Grantee.

WITNESSETH, That the said Grantor, for and in consideration of the sum of TEN DOLLARS ($10.00) and other

good and valuable considerations to her in hand paid by the said Grantee, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, convey and specifically warrant unto the said Grantee, the heirs and assigns, forever, the following described property situated in the County of Pierce, State of Washington, and more particularly described on the attached Schedule "A".

TO HAVE AND TO HOLD the same, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, unto the said Grantee, and the heirs and assigns of the said Grantee, forever. And the said Grantor, for herself and her successors, does covenant with the said Grantee and the heirs and assigns of the said Grantee, that she has not made, done, executed or suffered any act or thing whatsoever, whereby the above described premises or any part thereof nor at any time hereafter, shall or may be imperiled, charged or incumbered in any manner whatsoever; and the title to the above granted premises against all persons lawfully claiming the same from, through or under her the said Grantor will forever specially WARRANT and DEFEND.

SUBJECT TO easements, restrictions and reservations of record.

IN WITNESS WHEREOF the undersigned has set his hand and seal as Area Office Director, HUD Area Office, Seattle, Washington, for and on behalf of the said Secretary of Housing and Urban Development, under authority and by virtue of 35 FR 16106 and 39 FR 7608.

[FEE PAID: none. REC. NO. 408229 DATE 11-8-76; MAURICE RAYMOND Pierce Co. Treas. by /s/ DEPUTY]

WITNESSES:

/s/ Joyce Moen
/s/ James E. Brown

Carla A. Hills
Secretary of Housing and Urban Development

by /s/ (SEAL)
HUD Area Office, Seattle, Washington
Title: Area Director

STATE OF WASHINGTON
COUNTY OF KING : ss

I, Joyce Moen, do hereby certify that on this 1st day of November, 1976, personally appeared before me E. J. Mager, to me known to be the Director, HUD Area Office, Seattle, Washington, and the individual described in and who executed the within instrument by virtue of the authority vested in him by 35 FR 16106 and 39 FR 7608, and acknowledged that he signed and sealed the same as his free and voluntary act and deed, for and on behalf of Carla A. Hills, Secretary of Housing and Urban Development, for the uses and purposes therein mentioned.

Given under my hand and official seal the day and year last above written.

[Notary Seal] /s/ Joyce Moen
Notary Public in and for the State of Washington, residing at Bellevue in said County of King.

My Commission Expires: July 9, 1980.

2699596 11-8/76

2699596 Project No.: 127-44086-236 127-44113-236
Location: Tacoma, WA Tacoma, WA

SCHEDULE "A"

Situate in the County of Pierce, State of Washington, to wit:

PARCEL A:

Lots 3, 4, 5, 6, 7, 8, 9 and 10 and the West 45 feet of Lots 11 and 12 in Block 1813 of MAP OF NEW TACOMA, W.T., as per plat recorded in Volume A of Plats, records of Pierce County; TOGETHER WITH that portion of alley vacated by the City of Tacoma under Ordinance No. 2048, which attached by law to said Lots 3, 4, 5, 6, 7, 8, 9 and 10.

PARCEL B:

Lots 3, 4, 5. 6, 7, 8 and 9 in Block 1813 of MAP OF NEW TACOMA, W.T., as per plat recorded in Volume A of Plats, records of Pierce County; TOGETHER WITH that portion of alley vacated by the City of Tacoma under Ordinance No. 2043,

which attached by law to said premises.

PARCEL C:

Lots 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19 in Block 2314 of REED'S ADDITION TO THE CITY OF NEW TACOMA, as per plat recorded in Volume 1 of Plats, page 58, records of Pierce County.

PARCEL D:

Lots 5, 6, 7, 8 and 9 in Block 2315 of REED'S ADDITION TO THE CITY OF NEW TACOMA, as per plat recorded in Volume 1 of Plats, page 58, records of Pierce County.

PARCEL E:

Beginning at the intersection of the West right-of-way line of "G" Street and the North line of REED'S ADDITION TO THE CITY OF NEW TACOMA, W.T., as per plat recorded in Volume 1 of Plats, page 58, records of Pierce County; thence along the West right-of-way line of "G" Street, being also the East Line of Block 4 of BYRD'S ADDITION TO THE CITY OF TACOMA, as per plat recorded in Volume 1 of Plats, pages 20 and 21, records of Pierce County, North 08°57'00" West a distance of 711.16 feet to intersect with the North line of Lot 24 in Block 4 of said BYRD'S ADDITION; thence along said North line of Lot 24 In Block 4 of said BYRD'S ADDITION, South 89°59'30" West 121.42 feet to the West line of Parcel of property vacated by the City of Tacoma by Ordinance No. 2904; thence along said West line of said vacated property South 08°57'00" East 110.98 feet to intersect with the West line of Block 4 of said BYRD'S ADDITION; thence South - 08°57'00" East 100.16 feet to the North line of said REED'S ADDITION; thence along the said North line of REED'S ADDITION East 121.42 feet to the point of beginning.

PARCEL F:

Lots 1, 2, 3, 4, 25 and 26 in Block 2514 and Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26 in Block 2515 of REED'S ADDITION TO NEW TACOMA, W.T., as per plat recorded in Volume 1 of Plats, page 58, records of Pierce County.

Recorded Nov. 8, 1976, time 12:51 p.m. At the Pierce County Auditor's Office, Richard A. Greco, Auditor, By Deputy Auditor /s/ M. Balcom

2699596 11-8-76

PROJECT NAMES: CONIFER 5A CONIFER 5B & 5C
PROJECT NO. : 127-44086-236 127-44113-236
LOCATION: Tacoma, WA Tacoma, WA

U.S.DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
PROPERTY DISPOSITION PROGRAM
CONTRACT OF SALE AND PURCHASE (ALL CASH-NEGOTIATED)

THIS INDENTURE, executed by the Purchaser this 21st day of September, 1976, by and between the SECRETARY OF HOUSING AND URBAN DEVELOPMENT, hereinafter referred to as the Seller, and The Housing Authority of the City of Tacoma, hereinafter referred to as the Purchaser.

WITNESSETH:

1. Under the terms and conditions hereinafter set out, the Seller agrees to sell and the Purchaser agrees to purchase the property situated in the County of Pierce, State of Washington, and more particularly described in the attached Schedule "A".

Subject to easements, restrictions and reservations of record.

Together with the appurtenances and all articles of personal property and supplies owned by the Seller and used in connection with the operation of the property which may be located on the premises at the time of closing.

This sale is conditioned upon the Purchaser receiving funding pursuant to Consolidated Annual Contributions Contract Number S-49 previously entered into by and between the Seller and Purchaser. If such funding is not obtained within 60 days following the date this Contract is executed by the Seller, either Purchaser or Seller may terminate this Contract by giving notice in writing.

2. The agreed purchase price of said property is

$ 289,000 (Two hundred and eighty-nine thousand dollars) to be paid at closing.

In addition, the Purchaser assumes the obligation to pay all closing expenses including the state or federal revenue, deed, or documentary stamp taxes, recording fees, and any legal or title expense in connection with such continuation of or examination of title as may be required by the Purchaser.

3. Taxes, ground rents, sewer and water charges, garbage removal charges and all other operating expenses and operating income shall be prorated between the Purchaser and the Seller as of the close of business on the day this sale is closed, hereinafter referred to as the cut-off date. Casualty and surety coverages now carried by the Seller shall be cancelled as of the cut-off date.

4. All rents due and unpaid at the cut-off date shall be assigned to the Purchaser and all rents due after the cut-off date which have been collected by the Seller shall be paid over to the Purchaser.

5. All real property taxes and like charges against the property, including any improvement assessment installments (with interest), sewer and water charges, garbage removal charges and ground rents, due and payable on or before the cut-off date shall be paid by the Seller. The Purchaser shall pay and bear the expense of all improvement assessment installments (including interest) becoming due and payable after the cut-off date, and shall pay all real property taxes and such like charges accruing after the cut-off date.

6. No representations are made by the Seller as to the physical condition of the property to be conveyed, the number and occupancy of revenue producing units or any factor bearing upon valuation of said property. The Purchaser agrees to accept said property in its present condition and subject to existing leases and tenancies. Prior to the closing of the sale the Seller assumes the risk of loss from damage to the property by any cause (including but not limited to fire, flood, earthquake, tornado and vandalism) other than willful acts or neglect of the Purchaser, and in the event of such damage will provide for the

restoration of the property to a condition as good as prior thereto, except that if such damage is so extensive that the Seller is unwilling so to restore the property, the Seller may rescind this agreement of sale by sending written notice to the Purchaser, and the sending of such notice shall release the Seller from any and all claims arising from this transaction.

7. The form of conveyance shall be a special warranty deed in the form customarily used in the jurisdiction in which the property is located and in which the Seller warrants to defend title to the property against the lawful claims of all persons claiming by, from, through or under the grantor therein. Transfer of title and possession shall become effective midnight the date of closing.

8. The Seller agrees to accord to the Purchaser the privilege of inspecting such books, records, leases and title papers in his possession pertaining to the property herein described as may be desired by the Purchaser; and the Purchaser is to have a period of three weeks from the date hereof (or such extension thereof as may be agreed to in writing) within which to notify the Seller of any objection to title; and, if no objection is made within such period, the purchaser agrees to accept the title in its present condition. If any defect in title appears that would render the property unmarketable, and that cannot be cured within a reasonable time, or Seller is unable or unwilling to cure the objection, the Purchaser shall have the right to terminate this contract and, in the event of such title defect, the Seller reserves the right to rescind this agreement and to notify Purchaser in writing, and the sending of such notice shall release the Seller from any and all claims of the Purchaser arising hereunder.

9. Time is of the essence of this contract. The sale shall be closed within 60 days following execution hereof by the Seller at the offices of the Seller, or at such other time and place as may be agreed on by the parties in writing.

10. No Member of Congress or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but

this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

11. It is understood and agreed that the provisions of paragraphs 3, 4 and 5, above, will not be consummated before the closing of the sale, but that the same shall be held open for subsequent adjustment by a Collateral Agreement to be executed at closing by the Seller and the Purchaser.

12. This contract shall be binding upon the parties hereto and their respective heirs, executors, administrators, successors and assigns, but shall not be assignable without the written consent of the Seller. Any request for such consent shall be submitted in writing and shall enumerate each person holding or to hold as much as 10% interest in the proposed assignee. Seller will be allowed 30 days in which to act upon any such request.

IN WITNESS WHEREOF, the Purchaser has executed this instrument in triplicate the day and year first above written and the Seller has executed this instrument in triplicate this 30th day of September, 1976.

Witness as to Seller: CARLA A. HILLS, AS SECRETARY OF HOUSING AND URBAN DEVELOPMENT

/s/ E.J. Moger; Title: Area Director

Witness as to Purchaser: For the Housing Authority of the City of Tacoma

/s/ [illegible] /s/ William E. Henderson; Title: Chairman

/s/ [illegible]

Project No.: 127-44086 236 127-44113-236
Location: Tacoma, WA Tacoma, WA

SCHEDULE "A"

Situate in the County of Pierce, State of Washington, to wit:

PARCEL A:

Lots 3, 4, 5, 6, 7, 8, 9 and 10 and the West 45 feet of Lots 11 and 12 in Block 1813 of MAP OF NEW TACOMA, W.T., as per plat recorded in Volume A of Plats, records of Pierce County; TOGETHER WITH that portion of alley vacated by the City of Tacoma under Ordinance No. 2048, which attached by law to said Lots 3, 4, 5, 6, 7, 8, 9 and 10.

PARCEL B:

Lots 3, 4, 5. 6, 7, 8 and 9 in Block 1813 of MAP OF NEW TACOMA, W.T., as per plat recorded in Volume A of Plats, records of Pierce County; TOGETHER WITH that portion of alley vacated by the City of Tacoma under Ordinance No. 2043, which attached by law to said premises.

PARCEL C:

Lots 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19 in Block 2314 of REED'S ADDITION TO THE CITY OF NEW TACOMA, as per plat recorded in Volume 1 of Plats, page 58, records of Pierce County.

PARCEL D:

Lots 5, 6, 7, 8 and 9 in Block 2315 of REED'S ADDITION TO THE CITY OF NEW TACOMA, as per plat recorded in Volume 1 of Plats, page 58, records of Pierce County.

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Beginning at the intersection of the West right-of-way line of "G" Street and the North line of REED'S ADDITION TO THE CITY OF NEW TACOMA, W.T., as per plat recorded in Volume 1 of Plats, page 58, records of Pierce County; thence along the West right-of-way line of "G" Street, being also the East Line of Block 4 of BYRD'S ADDITION TO THE CITY OF TACOMA, as per plat recorded in Volume 1 of Plats, pages 20 and 21, records of Pierce County, North 08°57'00" West a distance of 711.16 feet to intersect with the North line of Lot 24 in Block 4 of said BYRD'S ADDITION; thence along said

North line of Lot 24 In Block 4 of said BYRD'S ADDITION, South 89°59'30" West 121.42 feet to the West line of Parcel of property vacated by the City of Tacoma by Ordinance No. 2904; thence along said West line of said vacated property South 08°57'00" East 110.98 feet to intersect with the West line of Block 4 of said BYRD'S ADDITION; thence South - 08°57'00" East 100.16 feet to the North line of said REED'S ADDITION; thence along the said North line of REED'S ADDITION East 121.42 feet to the point of beginning.

PARCEL F:

Lots 1, 2, 3, 4, 25 and 26 in Block 2514 and Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26 in Block 2515 of REED'S ADDITION TO NEW TACOMA, W.T., as per plat recorded in Volume 1 of Plats, page 58, records of Pierce County.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
SEATTLE AREA OFFICE
ARCADE PLAZA BUILDING, 1321 SECOND AVENUE, SEATTLE, WASHINGTON 98101

[HUD seal]

REGION X
Arcade Plaza Building
1321 Second Avenue
Seattle, Washington 98101

May 3, 1979

IN REPLY REFER TO:
10.3HDH

Mr. Huntley Gordon
Executive Director
Housing Authority of the
City of Tacoma
1728 E. 44th
Tacoma, WA. 98404

Dear Mr. Gordon:

Subject: WASH 5-18, Amended Development Budget

This letter will notify you that we approve your amended Development Cost Budget submitted May 1, 1979. The new Total Development Cost approved is $5,645,551.

Area Counsel will prepare an amendment to your Annual Contributions Contract S-49. We hope to have it to you so that your Board can act upon it and it can be executed by our office prior to May 8, 1979.

Sincerely,

/s/

Lynn G. Stowell, Director, Housing Division

CORRECTION SHEET

Name Conifer 5B Address 2326 & 2340 So G

Fire Zone 3 Zone R-4

New Building	Purpose	Type	Group	Story	Valuation
New	Apartments	V-NE'1-HR	H	2 2½ & 3	
Alteration					
Addition					
Moving					

16) Balconies on third floor of units shall provide access to other apartment as a secondary exit.

17) All exitways from 3 story buildings to be of 1-hr fire resistive construction.

Return this sheet with all plans and specifications when corrections have been made thereon.

Corrections as above indicated will be complied with.

(Sign here) _____

Signature of owner or applicant

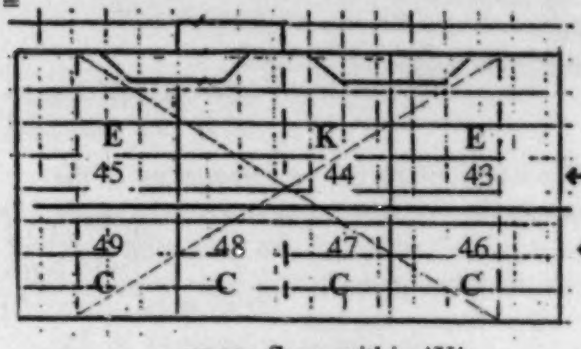
Checked by /s/ Charles H. Pearce

Date June 26, 1969.

BOOK _____
CITY OF TACOMA PAGE _____
PUBLIC WORKS DEPARTMENT SHEET 3 OF ___
PROJECT *THA Conifer Renovations* SUBJECT _____
COMPUTATION _____
COMPUTED BY *A.R.* DATE 1/28/77 CHECKED BY _____ DATE____

6

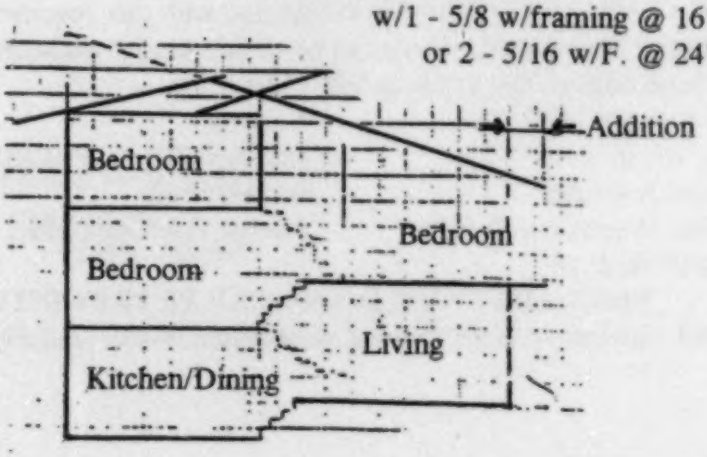
A-12 - E units
A-11 - K units
A-10 - C units



upper floor within 'X'

1-hr throughout req'd - Noted
Occ. Load 2nd Floor -K- 3+4=7 < 10
Floors above 2nd floor shall have not less than 2 exits
Call Wes Stewart (exiting ord. # 19587

Dbl. wood floor 5/8+1/2" inch ply
w/1 - 5/8 w/framing @ 16" o.c.
or 2 - 5/16 w/F. @ 24" o.c.



[Symbol]
City of Tacoma Fire Department
Tony F. Mitchell, Chief

November 14, 1977
Mr. Peter DeMark
Tacoma Housing Director
Tacoma Housing Authority
2302 6th Avenue
Tacoma, Washington 98403

Dear Sir:

A review of the plans for the remodeling of the buildings known as the Hillside Terrace has been made. During the plan review it was noted that in the units with four and five levels, the height from the lower living units to the ceiling of the open stairwell is twenty-six feet.

The Uniform Building Code states there shall be a smoke detector at the head of all stairways between sleeping areas and living areas. The plans indicate this has been done; however, the Tacoma Fire Prevention Bureau feels that the height is excessive; therefore, we are requesting that a second smoke detector be installed at the lower level living rooms. This will provide better protection in the event of a smoldering fire in the living area.

Your cooperation in complying with this requirement will be appreciated. If we can be of any further assistance please contact this office at 593-4436.

Yours truly,

/s/ H. E. LEAVITT
Fire Inspector
Fire Prevention Bureau

/s/STANLEY N. PARRISH
Fire Marshall
Tacoma Fire Department

SNP:HEL:ak

FIRES ARE CAUSED AND CAN BE PREVENTED
901 Fawcett Avenue,Tacoma,Washington 98402 (206)593-4433

City of Tacoma
Certificate of Occupancy

This is to Certify that the Renovation of Public Housing - Bldg 18 - 7 units located at 2340 South 'G' Street on property zoned R-4 has been inspected and found to meet or exceed the minimum standard of the building and zoning code and occupancy is hereby authorized.

This Certificate is to be posted on the premises.

[Seal of the City of Tacoma]

Permit No. E 57494
Date May 14, 1979

By /s/
Building Official
Spitzer Lot: 5-23-79

HUD-52423
April 1967
(Formerly PHA-2423)

U. S. Department of Housing and Urban Development
Low-Rent Public Housing
NOTICE OF DATE OF FULL AVAILABILITY
PROJECT NO. WASH: 5-18

We hereby certify that the "Date of Full Availability" of the above Project is the last day of February 1980, the month in which substantially all of the dwelling units in the Project become available for occupancy.

Housing Authority of the City of Tacoma
(Name of Local Authority)
By /s/ Huntly Gordon
Executive Director (Title)
(Date) 5-16-80

Approved for HUD:
By [not signed]
(Title) (Date)

[symbol] 1983-84
City of Tacoma Department of Public Works
ALL-AMERICA CITY

December 18, 1985
Robert L. Stettner, Chief
Architectural, Engineering and Cost Branch
U.S. Department of Housing and Urban Development
Seattle Office, Region 4
1321 Second Avenue
Seattle, Washington 98101-2054

Subject: Building Codes
Dear Mr. Stettner:

The City of Tacoma, Washington has adopted the 1982 edition of the Uniform Building Code, the Uniform Mechanical Code, the Uniform Fire Code and the Uniform Plumbing Code, with amendments. Enclosed please find copies of Ordinance 23200, Section 2.02.050 of the Official Code (Part of Ordinance 20208), Ordinance 23238, and Ordinance 23280 which combine to adopt the 1982 UBC and amend it. Also find enclosed Ordinance 22845 which adopts and amends the 1982 UPC, Ordinance 22914 which adopts and amends the 1982 UMC, Ordinance 23219 which adopts the 1982 UFC, and a copy of Chapter 5.46 of the Official Code of the City of Tacoma which is the Minimum Housing Code.

We are in the process of updating all of the codes at present. If you have any questions please contact Charles A. Pearson of my staff at 591-5019.

Sincerely,
/s/ William Larkin IV, P.E.
Chief, Building Division
WL:CAP:ba (6371F)
Enclosures
File: Building Division
Suite 444, Tacoma Municipal Building, 747 Market Street,
Tacoma, Washington 98402-3769

Supreme Court, U.S.
FILED
AUG 21 1998
OFFICE OF THE CLERK

No. 98-165

In The

Supreme Court of the United States

October Term, 1997

SHIRLEY C. CAIN, individually and as Personal Representative of the Estates of BRIAN KEITH THOMPSON, GREGORY ALLAN HERLITZKA, LYNETTE LORRAINE HERLITZKA and CYNTHIA S. HERLITZKA,

Petitioner,

vs.

THE CITY OF TACOMA, a Municipal Corporation,

Respondent,

and the TACOMA HOUSING AUTHORITY, a Municipal Corporation, and DOES I THROUGH V, inclusive,

Defendants.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

EDWARD S. WINSKILL
DENNIS G. SEINFELD
Counsel of Record
DAVIES PEARSON, P.C.
Attorneys for Respondent
P.O. Box 1657
920 Fawcett Avenue
Tacoma, WA 98401
(253) 383-5461

148171

(800) 274-3321 • (800) 359-6859

COUNSEL PRESS

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STATEMENT OF THE CASE

Petitioner brought a wrongful death action against the City of Tacoma (respondent) and the Tacoma Housing Authority for damages arising from the 1988 fire-related deaths of four persons in an apartment complex owned by the Tacoma Housing Authority. During the litigation process, the Tacoma Housing Authority, which owned, managed, and operated the apartments, settled with the petitioner.

Petitioner first filed suit against the Tacoma Housing Authority in 1988, asserting three claims for relief: violation of federal civil rights, strict premises liability, and negligence. In a Third Amended Complaint, the petitioner added respondent City of Tacoma ("City") as a defendant. In 1990, the City moved for summary judgment on all claims. The trial court denied the motion; the City obtained discretionary review of this denial from the Washington State Court of Appeals, Division II, in 1991.

By unpublished opinion dated January 31, 1994, the Court of Appeals for the most part reversed the trial court's denial of the City's Motion for Summary Judgment. (Appendix to Petition, A-6 et seq.) In its reversal, the Court of Appeals rejected all of the petitioner's federal claims and most of her substantive state claims (A-12 - A-15), and remanded the case to the trial court for a narrow factual determination: The size of a third floor bedroom window (i.e., whether or not the bedroom window in the fire unit met the size requirement of a fire code provision regarding windows as 'second exits'.) The Court of Appeals held that if the window met the size requirements of a Tacoma ordinance, then petitioner's last remaining state law claim must be dismissed. (A-17 - A-18).

Petitioner never sought review of the state Court of Appeals' 1994 decision. She had the right to petition the Washington

State Supreme Court for review of that decision, which right she never availed herself of; the 1994 decision of the Court of Appeals became final and the case was remanded to the trial court. Ultimately, upon further summary judgment proceedings, the trial court found that the window size requirements of the City's ordinance were met, and consequently, following the express instructions of the Court of Appeals, it dismissed petitioner's remaining state law claim on December 29, 1995. (A-19 - A-21).

Petitioner appealed to the Washington Supreme Court, which transferred the case to Division II of the Washington State Court of Appeals for decision. By unpublished opinion filed October 10, 1997, the Court of Appeals held that the trial court had precisely executed its instructions upon remand, that there was no dispute as to the size of the window and petitioner did not contend otherwise, and it accordingly affirmed the trial court's dismissal of the case. (A-22 - A-29).

The Washington Court of Appeals in the 1997 decision addressed petitioner's contentions that the 1994 Court of Appeals' ruling had been wrongly decided. It noted that petitioner had never sought review of the 1994 decision. It thus restricted its examination of the earlier decision under "law of the case" principles. It independently examined the earlier decision in that light, notwithstanding the fact that petitioner never made any contention as to why law of the case principles should not preclude her arguments. The Court of Appeals held that the 1994 decision was neither clearly erroneous nor did it create a manifest injustice, thereby rejecting petitioner's renewed attack on the older decision.

The Washington Supreme Court denied petitioner's timely petition for review of the 1997 Court of Appeals' decision, and petitioner has now brought this Petition for a Writ of Certiorari.

SUMMARY OF REASONS WHY THE WRIT SHOULD BE DENIED

A. Petitioner seeks review of substantive decisions made by the Washington Court of Appeals in 1994. She never sought review of that decision before the Washington Supreme Court. Accordingly, the decisions of which she seeks review were not made by the state court of last resort, and this Court thus has no certiorari jurisdiction.

B. The first of petitioner's "questions presented for review" in her petition was never in dispute — the City never argued nor did the state court ever rule that the state's statute of repose applied to petitioner's federal claims.

C. The second of petitioner's "questions presented for review" in her petition is in essence a meaningless *non sequitur* — the Tacoma Housing Authority is not an agency of the City, and petitioner never made any showing of any contract, statute, or regulation which required the City to enforce HUD regulations with regard to the apartments in question.

D. The 1997 State Appeals Court decision which petitioner seeks to have reviewed was decided upon narrow factual grounds and "law of the case" grounds, neither of which are suitable for certiorari review.

E. In any event, the decisions petitioner seeks to have reviewed constituted unremarkable applications of settled rules of law in a fact-specific context.

DISCUSSION OF REASONS FOR DENYING THE WRIT

I.

THE DECISIONS FROM WHICH PETITIONER PURPORTS TO SEEK REVIEW WERE NOT RENDERED BY THE HIGHEST STATE COURT IN WHICH A DECISION COULD BE HAD. THIS COURT THUS LACKS CERTIORARI JURISDICTION.

The Supreme Court's certiorari jurisdiction over state court decisions is limited to final judgments or decrees rendered by the highest court of a state in which a judgment could be had. 28 U.S.C. § 1257.

The 1994 opinion of the Washington State Court of Appeals, Division II, is the only court decision which directly addressed the substance of petitioner's federal law claims. It is undisputed the petitioner never sought review of the 1994 Court of Appeals' decision, and it is equally undisputed that she had a right to seek discretionary review by the state Supreme Court of that decision had she filed a petition for discretionary review within thirty days of the Court of Appeals' decision. (Washington Rules of Appellate Procedure 13. *See* A-24).

Therefore, of course, when the matter was again before the state Court of Appeals in 1997, petitioner's attack on the 1994 decision was rejected on "law of the case" grounds after the court's determination that the earlier decision was neither clearly erroneous nor involved a manifest injustice. Thus, the Supreme Court's certiorari jurisdiction cannot be invoked in this case. *See Banks v. California*, 395 U.S. 708, 23 L. Ed. 2d 653, 89 S. Ct. 1901 (1969), *reh. den.*, 396 U.S. 869, 24 L. Ed. 2d 124, 90 S. Ct. 36; 28 U.S.C. § 1257.

II.

THE FIRST "QUESTION PRESENTED" BY THE PETITION HAS NEVER BEEN IN DISPUTE.

The first of petitioner's "questions presented for review" in the Petition for Writ of Certiorari is the following:

> Can a State statute of repose be applied to bar federal claims under 42 USC § 1983 and federal claims as third party beneficiaries of HUD regulations and contracts?

The answer to this question is, in short, **no**, at least not in the context of this case. But the City never contended that petitioner's federal claims were barred by the state construction statute of repose. The Court of Appeals in its 1994 decision never held that they were. Indeed, any reading of that opinion will show that the court's resolution of petitioner's federal law claims was on their merits, and had nothing to do with the statute of repose. The state construction statute of repose was asserted by respondent as a defense to petitioner's state law claims of failure to enforce municipal building codes with reference to the 1979 remodel of the Conifer Apartments — nothing more, nothing less.

The assertion of this non-issue as the principal "question presented" by a petition to the United States Supreme Court for a writ of certiorari is inexplicable. In short, this is a position that no party has ever asserted and that no court has ever ruled upon. Petitioner's conjuring it up now merely underscores the lack of merit to her petition.

III.

PETITIONER'S ADDITIONAL "QUESTION PRESENTED" IS LIKEWISE ILLUSORY.

The second and final "question presented for review" by petitioner is the following:

> Can a city avoid the responsibility to provide safe housing under HUD funding regulations and contracts by creating a housing authority?

This tortured argumentative question can be disposed of summarily. First, the City of Tacoma never "created" a housing authority. Housing authorities are independent municipal corporations created by state law. The City's only role in the formation of a housing authority under state law is by resolution to declare the need for it. Revised Code of Washington 35.82.030. The Tacoma Housing Authority is not an agency of the City, is not controlled by the City, and it, not the City, acquired and operated the apartment units at issue. This was always undisputed (as noted in the 1994 Court of Appeals decision), and it is unchanged by such disingenuous statements by petitioner as found at page 1 of the Petition, that the apartments in question were acquired "by the City through its housing authority". The City never acquired the apartments, never remodeled them, never owned them, never operated them, never maintained them.

But at bottom, the ineluctable fact of the matter is that in the ten-year history of this litigation up to and including the instant petition, the petitioner has *never* cited any case, any statute, any regulation, any contract, or any other authority whatsoever establishing that the City of Tacoma had any duty to enforce HUD regulations with regard to the subject properties

owned and operated by the Tacoma Housing Authority. This was observed by the Washington Court of Appeals in its opinion in 1994. It hasn't changed a bit since.

IV.

NO QUESTIONS APPROPRIATE FOR CERTIORARI REVIEW ARE PRESENTED BY THIS CASE.

As indicated above, and as shown by a reading of the 1997 Court of Appeals' opinion, the state court found the 1994 decision of the Court of Appeals to be the "law of the case" with respect to petitioner's substantive claims, including her federal claims. This was precisely because of petitioner's failure to seek review of the 1994 Court of Appeals' decision. Nothing about such a disposition meets the criteria of the considerations governing review on certiorari as set out in Rule 10 of the Rules of the Supreme Court. Application of "law of the case" principles constitutes a routine application of state law. The disposition of the case petitioner seeks to have reviewed thus involves no question of federal law at all.

Lastly, as Rule 10(c) of this Court's rules provides, "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

Even if this Court had jurisdiction to review the decisions that the state Court of Appeals made in 1994, that court's decision at that time reflects an unremarkable application of settled federal legal principles. The petitioner had asserted a 42 U.S.C. § 1983 claim against the City, contending first that the City's alleged failure to adequately enforce applicable codes and regulations amounted to a constitutional deprivation and, secondly, that she had a private cause of action under that statute

against the City for its supposed failure to enforce applicable HUD regulations even without a showing of a constitutional deprivation. The first claim failed because it sounded in mere negligence, which does not normally give rise to a private cause of action under 42 U.S.C. § 1983. *See e.g. Daniels v. Williams*, 474 U.S. 327, 329-36, 88 L. Ed. 2d 662, 100 S. Ct. 662, 677 (1986); *Davidson v. Cannon*, 474 U.S. 344, 347-48, 88 L. Ed. 2d 677, 106 S. Ct. 668 (1986). As to the second prong of her 42 U.S.C. § 1983 claim, as has been discussed above, the petitioner was never able to make any showing whatever of a duty on the part of the City to enforce HUD regulations. These matters are addressed in the 1994 Court of Appeals' opinion. (A-12 - A-15). As to the negligence claim based upon 42 U.S.C. § 1983, the law is clear and settled. As to the claim in regard to the HUD regulations, petitioner to this day has never made any showing of duty; much less did she do so by the time of the 1994 Court of Appeals' disposition.

CONCLUSION

The Petition for Writ of Certiorari should be dismissed for lack of jurisdiction. Alternatively, it should be denied for the reasons stated.

Respectfully submitted,

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